85-537

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1985

Andrews B. Campbell, Petitioner

v.

State of Maine, Respondent

Dennis Eugene Friel, Petitioner

v.

State of Maine, Respondent

PETITION FOR WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE SITTING AS THE LAW COURT

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September 26, 1985

QUESTIONS PRESENTED

1. May a State Trial Judge, consistent with due process, hold a defendant in a State felony trial in summary contempt of Court and remove him from the Courtroom for the remainder of his trial, without any explanation, based on (a) seriatim contemptuous actions not cited of Record during trial; (b) under circumstances where the trial judge's impartiality is objectively open to public question for religious and prosecutorial bias?

2. May trial counsel, consistent with due process, be held in summary contempt by a trial judge who is publicly perceived as biased based on objective evidence (a) for consulting with a

defendant excluded from the Courtroom for the remainder of his trial in a multi-defendant trial absent express authorization; (b) for making a record when his client is removed without explanation for actions not cited of Record during trial; (c) for exercising a tactical decision not to crossexamine; and (d) for asserting the need to seek a federal remedy.

3. May a Federal Court, consistent with due process, issue an order preventing trial counsel in a State criminal proceeding not under jurisdiction of the Federal Court (a) from disclosure of a federal agent or informant's identity in the defense camp and (b) from advocacy of prejudice in the State Court proceeding.

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IN THE

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Dennis Eugene Friel, Petitioner

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE SITTING AS THE LAW COURT

Petitioners, Andrews B. Campbell, and Dennis Eugene Friel, respectively request that Writs of Certiorari issue in each of

their cases to review the respective judgments of the Supreme Judicial Court of the State of Maine, sitting as the Law Court, which, based on principles of federal law, affirm summary judgments of criminal contempt, respectively, against Friel, an indigent defendant in State felony criminal proceedings, and against Campbell, his Court assigned counsel.

OPINIONS BELOW

The Maine Supreme Judicial Court affirmed respective judgments of summary criminal contempt against each Petitioner on August 6, 1985 in State of Maine v. Dennis E. Friel, Decision 3903, Me. 1985, A.2d ; State of Maine v. Andrews B. Campbell, Decision 3904, Me. 1985, A.2d , Appendixes 1 and 2 hereto. Each Petitioner moved in a timely manner

for rehearing and reconsideration which was denied by respective Orders of August 26, 1985 (appendixes 3 and 4) and Petitioners each were granted until September 30, 1985 to file petitions for writ of certiorari. The two judgments arise out of the same criminal trial and involve closely related questions of law and fact.

JURISDICTION

The decisions of the State of Maine Supreme Judicial Court were entered on August 6, 1985. Motions to reconsider were denied by orders of August 26, 1985. Petitioners were each granted until September 30, 1985 to file petitions for certiorari. The jurisdiction of this Court is therefore invoked under 28 U.S.C. §1257. Possible jurisdiction is also invoked

pursuant to 28 U.S.C. §1651 as discussed under point three herein.

QUESTIONS PRESENTED

1. May a State Trial Judge, consistent with due process, hold a defendant in a State felony trial in summary contempt of Court and remove him from the Courtroom for the remainder of his trial, without any explanation, based on (a) seriatim contemptuous actions not cited of Record during trial; (b) under circumstances where the trial judge's impartiality is objectively open to public question for religious and prosecutorial bias?

2. May trial counsel, consistent with due process, be held in summary contempt by a trial judge who is publicly

perceived as biased based on objective evidence (a) for consulting with a defendant excluded from the Courtroom for the remainder of his trial in a multi-defendant trial absent express authorization; (b) for making a record when his client is removed without explanation for actions not cited of Record during trial; (c) for exercising a tactical decision not to crossexamine; and (d) for asserting the need to seek a federal remedy.

3. May a Federal Court, consistent with due process, issue an order preventing trial counsel in a State criminal proceeding not under jurisdiction of the Federal Court (a) from disclosure of a federal agent or informant's identity in the defense camp and (b)

from advocacy of prejudice in the State Court proceeding.

CONSTITUTIONAL CLAUSES AND RULES

Article VI, United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitutions or Laws of any State to the Contrary notwithstanding.

First Amendment, Unites States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercize thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or peroperty without due process of law; nor shall private property

be taken for public use without just compensation.

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment, United States Constitution, Section One

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Maine Rule of Criminal Procedure, Rule 42 (a)

(a) Summary Disposition. A criminal contempt may be punished summarily if the justice certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the justice and entered of record.

STATEMENT

The Petitioner Dennis Eugene Friel (hereinafter sometimes referred to as "Defendant") was indicted on the third of three indictments[1] with one Donald Lagasse for allegedly committing aggravated criminal mischief by painting religious symbols ("666" and "Babylon")[2] on various

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[1]Trial counsel was (a) threatened with prosecution; and (b) ordered not to disclose to the defendant identities of witnesses against the defendant under the first indictment, State v. Friel, Andro CR-83-489 (indictment of October 12, 1983 dismissed March 16, 1984 for absence of jurisdiction) for approximately six months, and his secretary interrogated by the Attorney General's Office during the pendency of these proceedings. See State v. Campbell, Law Kno-84-361.

[2]Petitioner Friel, an indigent, was denied theological expert assistance by the trial judge. cf. Ace v. Oklahoma, 105 S.Ct. 1087 (1985). The Petitioner Friel, as argued infra, is an anti-Roman Catholic religious zealot with a defense implicating the free exercise clause of the First Amendment (condonation not commission of the crimes, reasonable alternative hypotheses to guilt, and conspiratorial misidentification of

churches in three Maine counties on April 9, 1984. Petitioner, Andrews B. Campbell, Esq., (hereinafter sometimes referred to as "trial counsel") was appointed to represent the indigent Defendant, Dennis E. Friel, on April 13, 1984. After numerous pretrial motions, the case was transferred to the Superior Court, Knox County, Maine. Campbell moved for a continuance based on need to be in U.S. District Court on United States of America v. Selden Von Herten, U.S.D.C., So. D. Me., 1984 CR-84-00033-P, (interim order appealed 1st Cir. 9/26/85), and on the fact that Grand Juror affiliations with the Churches raised jurisdictional questions requiring further inquiry. (R. 346.) After pretrial motions on September 7, 1985, and jury selection on September 10, 1985, testimony opened on September 11, 1984. On September 12, 1984,

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himself as the guilty party).

Petitioner Friel was summarily found in contempt by the trial justice at 9:29 a.m., sentenced to three days in jail, and removed from the Courtroom for the remainder of his trial. At 10:38 a.m., Petitioner Campbell was summarily found in contempt and sentenced to five days in jail. A mistrial was declared at 12:48 p.m. that same afternoon, September 12, 1984, after Petitioner Campbell chose not to crossexamine five witnesses. The following sequence occurred when Friel was held in contempt and jailed. During sidebar conference, the trial judge evidently observed what he considered contemptuous conduct by Petitioner Friel and stated:

> "THE COURT: Secondly I'm going to tell you right now that if your client disrupts this Courtroom by going in and out . . .

> MR. CAMPBELL: Your Honor, this is the first time he's left the Courtroom. He went to the bathroom. We are at sidebar. I will ask permission for him to go to the bathroom next time." (T.T. 408.)[3]

The jury was excused at 9:29 a.m.

> "THE COURT: Due to the conduct of the Defendant in this Courtroom, which I find totally disrespectful, I do hereby find Mr. Friel in contempt of court. I do hereby sentence him to three days at the Knox County Jail, the Defendant, Mr. Friel."
>
> MR. CAMPBELL: What conduct?
>
> THE COURT: Mr. Campbell, you are an officer of the Court.

---

[3]Reference to Trial Transcript "T." are to trial in State v. Friel, Kno. CR-84-369, Andro. CR-84-169 (same as Kno CR-84-369, prior to change of venue 7/15/84). References to Motion Transcript "M.T." are to hearings held September 7, 1984. Kno. CR-84-369 (a sua sponte mistrial) dismissed January 29, 1985 on plea of double jeopardy, appealed by the State pursuant to 15 M.R.S.A. §2115-A (1), on February 6, 1985, and is sub judice, Law Kno-85-64. Docket entries in State v. Friel, Kno. CR-84-369, Law Kno-CR-85-64 were entered in the Record of the contempt appeals, Law Kno-84-360, Kno-84-361. References are to the Record in Law Kno-85-64.

MR. CAMPBELL: Tom Goodwin of the State was informed exactly what my client was doing.

THE COURT: If you insist I may request that I hold you in contempt of Court. The Defendant may be taken into custody.

(Whereupon Mr. Friel was ushered out of the Courtroom.)

MR. FRIEL: You are a communist fascist Catholic.

MR. CAMPBELL: My client has been taken from the Courtroom without my being told why. I saw nothing contemptuous.

THE COURT: I will find you in contempt if you do not desist from your activities.

MR. CAMPBELL: Your Honor, this is not . . . we have to obey the United States Constitution.

THE COURT: Read the rule and . . .

MR. CAMPBELL: I would like to address the Court on the rule right now. I would like to know what contempt. . .

THE COURT: Court will be in recess briefly. (T.T. 409-411.)

Neither the prosecuting Assistant Attorney General nor co-defendant's appointed counsel, Hal Weisberger, Esq., nor the Court Reporter, under express order to take down gestures (T.T. 40-42), indicated for the record that either had seen anything contemptuous.

Thereafter the Court refused to grant any explanation whatsoever to Campbell as to the reasons for Mr. Friel's removal, stating:

> "THE COURT: I'm telling you, he's been taken into custody. He's going to be barred from this Courtroom for the remainder of this trial. I don't want to hear anything more from you, Mr. Campbell." (T.T. 413.) (Emphasis added.)

Mr. Campbell went on to state, out of the presence of the jury:

"I wish to address the Court that prior to going out he talked to Tom Goodwin. He's here to testify about what he said. He's here to testify about what he said. He talked to the Deputy Sheriff. He's here to testify to it. Every person in the Courtroom, all the press saw exactly what happened. They're here to testify to that. I just, for the record, I want to make a point that a record can be made as to everything Mr. Friel did by everyone in this Courtroom. They're here now. They may be harder to reach later on. I personally believe, and I'm going to state for the record, that this was a judicial trap." (T.T. 413.)

THE COURT: I'm sorry? [sic.] (T.T. 414.)

MR. CAMPBELL: I believe he was trapped into that, sir, I didn't see it. I was talking to the Court at sidebar. When I asked the Court what he had done wrong, apparently he went out of the Courtroom, apparently he went out to go to the bathroom. (T.T. 414.)

THE COURT: Mr. Campbell, I'm not going to get into the facts and circumstances of the reasons for my finding him into contempt. I'm telling you, sir, on the record, he's barred from this Courtroom, for the remainder of

> this trial, or until such time that I say." (T.T. 414.)

Petitioner Campbell then sought permission to go speak with his client "at great length". (T.T. 414.) The Court denied Mr. Campbell's request, stating that the trial would continue and that "to do so" (speak with his client) would be "at your peril". (T.T. 414.) Campbell addressed the Court objecting to Friel's exclusion, and stating:

> "I have been ordered to stand mute already by my client, . . . it causes me great grief to have to stay at a proceeding where the Court has done in [sic] doing so under order of the Court." (T.T. 415.)

The Court responded, "I am particularly concerned about your performance here, particularly as it pertains to today." (T.T. 416.) Petitioner Campbell then again asked for

permission to speak with his client and again the Court responded ambiguously stating, "You do so at your peril." (T.T. 417.) Counsel expressed concern that if he participated further in the proceedings, he might waive his client's rights, (T.T. 417, 424), and informed the Court again his client had instructed him to remain mute. (T.T. 418.) Campbell shortly thereafter stated:

> MR. CAMPBELL: In my argument I'm relying on the Fifth Amendment to the United States Constitution, the First Amendment to the United States Constitution, Article I, Section 6 (inaudible) of the Maine Constitution. I would request a transcript of all proceedings to date in this trial to be prepared on an expedited basis immediately. Thank you. Will the Court rule, please? (T.T. 419.)

Soon after the trial resumed, Campbell again asked to go out and consult with his

client, who remained excluded from the Courtroom:

> "MR. CAMPBELL: Your Honor, may it please the Court. I have to go out and consult with my client for a moment. I realize the Court has ruled that I waive . . .
>
> THE COURT: Mr. Campbell, you are interrupting the proceedings. You may be seated.
>
> MR. CAMPBELL: May I see my client?
>
> THE COURT: No. You may be seated.
>
> MR. CAMPBELL: No? May I leave the Courtroom?
>
> THE COURT: I am not authorizing you to leave the Courtroom. You are representing a particular defendant in this matter.
>
> MR. CAMPBELL: I don't think I need authorization, do I?

(No further response by the Court.)

(Whereupon Mr. Campbell exited the Courtroom.) (T.T. 424-425.) (Emphasis added.)

The trial judge allowed Campbell thereafter without comment to exit the Courtroom three times to a room where the trial justice stated that Friel could listen to the trial. (T.T. 417, 427, 430-432.) The trial continued during Campbell's brief absences. When called upon by the Court to crossexamine a witness on the stand, Campbell responded, "Your Honor, I have already stated to the Court that my client and I . . ." Whereupon the Court interrupted and excused the jury, and the colloquy reported in Campbell (T.T. 438-440) occurred, resulting in the trial judge finding Campbell in criminal contempt and sentencing him to five days in jail, (T.T. 440).

After the jury was recalled, Campbell continued not to crossexamine witnesses. (T.T. 441, 443, 456.) At 11:30 a.m., the

trial judge ordered a chambers conference with co-defendant's counsel and the Assistant Attorney General. Petitioner Campbell was excluded from that discussion, and the trial judge announced a mistrial as to Friel, based expressly on Campbell's standing mute. (T.T. 469). Immediately thereafter charges against the co-defendant Lagasse were dismissed based on insufficient evidence (R. 425). The trial justice subsequently denied Petitioner Campbell attorney fees (R. 516) based on his decision not to crossexamine and revoked his appointment as counsel. (T.T. 475.)[4] After Friel and Campbell had served part of their sentences, the Court granted stays of execution.

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[4]See State of Maine v. Dennis E. Friel, Law Kno-85-13 (Me. 1985) holding no jurisdiction in Law Court to review Superior Court orders setting fees for assigned counsel.

The trial justice did not enter in the record of the underlying case, State v. Dennis E. Friel, Kno-84-369, but filed contempt affidavits, as new criminal files, respectively against Campbell and Friel (Appendixes 5 and 6). The affidavit against Petitioner Friel cites numerous actions as contemptuous conspicuous by absence of contemporaneous record. Most significantly, Petitioner Friel is stated, after returning from the bathroom, to have "lifted his hand with his middle finger pointing upwards" and stated "smirkingly, 'next time I will ask to go number one'." Neither the above action nor statement appears in the trial transcript, but for the first time appears in the subsequent contempt affidavit.

The actions cited in the affidavit were not held to constitute contempt or as

the basis of warning prior to Petitioner Friel's removal for the remainder of his trial, notwithstanding Campbell had been assured:

> "MR. CAMPBELL: The observation, if you could make it for the record, I would ask that any observation that my client conducts be spelled out on the record.
>
> THE COURT: They have to be. I'm required that they are. I will make certain that they are . . ." (T.T. 41.) (Emphasis added.)

Further, the affidavit filed against Petitioner Friel is contradicted by the transcripts on more than one occasion. For example, the affidavit states Petitioner Friel "referred to the trial justice as a crooked judge", when the transcript shows he stated, "there are crooked judges". (M.T. 9/7/84 at 85.) Friel states that Petitioner Friel was warned that the trial judge "would not permit his disrespectful

actions to interfere with the trial". The trial transcript shows that at the time of this warning, the trial judge, could indicate no contemptuous actions. (T.T. 42.) The warning to Mr. Friel occurred after Campbell, citing the Sixth Amendment, objected to repeated substantive motions heard in chambers, without the defendant (T.T. 38-39). The warning included: ". . . If you choose not to have an unjust trial, that is your choice. Clearly understand, Mr. Friel, [sic] and Mr. Lagasse, it is unfortunate if you do that." (T.T. 40-42.) At no point do Friel or Campbell review the referred to, but unincluded, affidavits against the transcript of trial.

The affidavit against Petitioner Campbell, similarly is against the record

and transcript of trial. For example, Campbell states:

> "After the recess, but before the jury returned to the Courtroom, there was a discussion between the presiding justice and counsel concerning the contempt finding made against Friel. Campbell again protested the Court's decision to find his client in contempt, and referred to the incident as a 'judicial trap'." (Appendix at .)

The trial transcript, however, shows the only discussion occurred while Campbell was not present:

> THE COURT: ". . . I believe Mr. Campbell is on the phone. He has asked for five minutes and we are by that now. While we are waiting, perhaps, Mr. Weisberger, is there anything you care to address to the Court on behalf of your client? (T.T. 411-412.)

The transcript indicates the Court refused to discuss the contempt citation against Friel with Campbell:

> "MR. CAMPBELL: I haven't received any order . . .
>
> THE COURT: I'm telling you he's been taken into custody. He's going to be barred from this Courtroom during the remainder of this trial. I don't want to hear any more from you, Mr. Campbell. (T.T. 413.)

Further, the transcript reveals Campbell stated qualifiedly: "I personally believe, and I'm going to state for the record, this was a judicial trap." (Emphasis added.) (T.T. 413.) At no point in Campbell or Friel, does the State Court advert to the fact that neither defendant nor counsel was given any explanation as to the reasons for the removal of Friel from the Courtroom for the remainder of his trial.

In upholding the respective contempt citations, the Maine Supreme Judicial Court expressly relied on Maine Rule of Criminal

Procedure 42 (b), "almost identical to the federal rule of like number", and further relied heavily on federal precedent.

Friel and Campbell significantly do not disclose that the charges against Petitioner Friel involved placing religious symbols (the numerals "666" and "Babylon" from the Bible, King James Version, Book of Revelation) on Church walls, and were extremely highly publicized. Primary State's evidence was a letter found at the scene of the mischief, which inter alia characterized the Roman Catholic Pope as the Anti-Christ. (T.T. 12-13, 33-34, 332-337, 430-431, 375-378, 214-251; M.T. 20-25, 85, 101.) Petitioner Friel, an anti-Roman Catholic zealot (R. 8, 51, 300-302, 354; M.T. 45, 73), endorsed the message, but denied guilt for the mischiefs. Petitioner Friel submitted an affidavit to the Court

that the indicting Grand Jury included members of victim churches and was disproportionately Roman Catholic, (R. 104-106). Hamilton, assigned investigator refused to investigate this fact (R. 338) and the trial judge prevented further inquiry (R. 119, 121, 169, 170, 201). Nor do Friel and Campbell disclose that Friel had further moved to recuse the trial justice who professed ". . . it [This Court] is Catholic and embracing that religion . . . (Emphasis added.) (M.T. 84; R. 316-317); and brought a mandamus action against the trial judge to force disqualification, (R. 428)[5], still pending

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[5]Friel v. State, Andro CV-84-333: Petitoner Friel through counsel asserted an "Oath of Office Defense", that when the Court because of appearance of conflict or bias compels the defense to question the appearance of violation of oath of office, the recusal and disqualification are required. (Hearings before Assc. Justice Louis Scolnik.)

during trial. Petitioner Friel had also brought a pro se proceeding in the U.S. District Court which was dismissed without hearing before trial. See Friel v. Scales, et al, CV-84-0273-P, aff'd. 2/15/85, 1st Cir. No. 84-1743. The trial judge was represented by the Attorney General of the State of Maine, which was prosecuting Friel. (M.T. 99-101, 104-106, 134-135, 161-164, 170, 184-187, 316-317, 369-370.)

The transcripts further disclose Petitioner Friel, attempting to assert his rights, and the trial judge, excluding Petitioner Friel over objection from extremely important substantive motions (T.T. 3-43), including the denial of funds to call Hamilton as a witness (T.T. 6-10), opening address to the jury (T.T. 44-64), and challenges to the jury, (T.T. 39, 40, 43), resulting as a practical matter, in

the exclusion in chambers of Christian fundamentalists from the jury, against Petitioner Friel's will. (T.T. 92, 116, 123, 165-166.) Petitioner Friel, an indigent, although he publicly embraced the message left on the churches, was denied theological assistance to show asserted wrongheadedness of this trial as well as why the evidence did not show guilt. (M.T. 23-25, R. 174) and to show other reasonably hypotheses. (M.T. 72-73.) In this respect, the indictment reveals that only sunday worship, not adventist, churches were vandalized. The trial judge had ruled that Friel could express his own religious conviction in defense at trial only "at his peril". (Emphasis added.) (M.T. 24, 101.) Further, according to an affidavit filed by Friel in support of his motion to reconsider, Law Court file Kno-84-360, an investigator licensed under authority of

the Attorney General, appointed to assist Petitioner Friel by the trial judge (Transcript of June 8, 28, 1984 hearings in Androscoggin County Superior Court) over objection, was a "paid F.B.I. informant"; Campbell's counsel in State v. Campbell, Law Kno-84-361, and Campbell are presently under an order from the U.S. District Court, Southern District of Maine, not to disclose this. (See infra Point Three).

Neither Friel nor Campbell disclose that Campbell, as assigned counsel argued in depth that a professing Roman Catholic judge, represented by the prosecutor's office, could not Constitutionally hear trial of anti-Roman Catholic zealot Friel given the religiously charged trial evidence. As stated by Petitioner Campbell to the trial judge, ". . . this reflects a background, perhaps unconscious bias or

prejudice, Your Honor. That's exactly why the Defendant cannot have a judge of the Roman Catholic faith . . ." (M.T. 25.) Or as counsel for Mr. Lagasse stated, "His own view to request recusal was that he has an anti-Catholic attitude. That he believes the Pope is the Beast and that we now have a Catholic judge, respectively sitting on the bench." (M.T. 83, T.T. 93-94.) Petitioner Friel stated during trial, "This may sound cute, but I'm serious. There is no way you can be unprejudiced. You have proven that." (T.T. 173.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because these cases raise the significant question whether the Courts of the State of Maine may approve or utilize the State Court's contempt power, exercised by an apparently

biased trial judge, applying federal principles of law, to remove an accused for the remainder of his trial by fiat, and then compel assigned counsel to present an active defense at the risk of jail. In view of the fundamental principle that the Constitution is the "Supreme Law of the Land", and "the Judges in every State shall be bound thereby, any Thing in the Constitutions or laws of any State to the contrary notwithstanding", Article VI, U.S. Constitution, it is submitted that Campbell and Friel apply M.R.Crim.P., Rule 42 in an unconstitutional manner.

Point I

A State Trial Court May Not Hold a Defendant in a State Felony Trial in Summary Contempt of Court and Remove Him From the Courtroom for the Remainder of His Trial, Without Any Explanation, Based (A) on Seriatim contemptuous actions Not Cited of Record During Trial; (B) Under Circumstances Where the Trial Judge's Impartiality is Objectively Open to Public Question for Religious Bias and Prosecutorial Bias.

(A) Seriatim not cited of record actions resulting in a later contempt citation may be permissible under certain circumstances. See, e.g., Sacher v. United States, 343 U.S. 1 (1951); Offutt v. United States, 348 U.S. 11, 13 (1954); In Re Dellinger, 416 F.2d. 389, 397 (7th Cir. 1972), on remand, 370 F.Supp. 1304 (N.D. Ill. 1973), aff'd 502 F.2d. 813 (7th Cir. 1974).

Application of summary contempt, because the requirements of notice and hearing need not be observed, is however "narrowly limited". cf. United States v. Abascal, 509 F.2d. 752 (9th Cir. 1975) (applying the federal rule); to which M.R.Crim.P. 42, pursuant to 4 M.R.S.A. Section 114, is nearly identical. A fair trial, a fair tribunal, and the absence of

bias, basic due process notions are nullified under this procedure.

Thus, significant limitations have been imposed on the summary contempt power since it was first embraced by the Court in Ex Parte Terry, 128 U.S. 289 (1888). See Cooke v. United States, 267 U.S. 517 (1925); United States v. Meyer, 462 F.2d. 827, 831-838 (D.C. Cir. 1972); See also Groppi v. Leslie, 404 U.S. 496 (1948); Weiss v. Burr, 484 F.2d. 973 (9th Cir. 1973).

This Court concluded in Offutt, 348 U.S. (1954) 11, that the policy of preserving order was inoperative because the trial was completed and the policy against wasting resources was inapplicable by reason of the trial judge's personal embroilment. United States v. Meyer, 462

F.2d. at 838. The holding of Offutt was further extended in Mayberry v. Pennsylvania, 400 U.S. 455 (1971), where the Court required recusal as a matter of due process when the trial judge was the victim of an insulting personal attack by a pro se defendant. An inevitable potential for bias was generated. 400 U.S. at 645-466. Mayberry was further defined in Taylor v. Hayes, 418 U.S. 488, 501 (1974), where the Court held that "contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him in the controversy that he cannot hold the balance nice, clear and true between the State and the accused . . ." (emphasis added), quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927).

Both Federal and State standards for exercise of summary contempt power, also

presuppose that "unless the conduct actually obstructed the administration of justice in his Court, he [the trial judge] must afford the contemnor a plenary proceeding instead of punishing him summarily . . ." In Re Bernard, 406 A.2d. 1279, and "That only 'the least possible power adequate to the end proposed' should be employed in the contempt proceedings . . ." United States v. Wilson, 421 U.S. 309; see also Harris v. United States, 382 U.S. 162.

The "least possible power adequate to the end proposed" in Friel was not the highly disfavored action of excluding a defendant without articulated reason for the remainder of trial, actively misleading the public, counsel, and the defendant. In this respect Friel states that Petitioner Friel's going out to the bathroom was a

sufficient obstruction to justify summary contempt. But, the trial judge clearly did not hold this to be contempt at trial. (T.T. 412-418.) Thus, Friel must either be premised on a view that the trial record is immaterial, or as taking an ambiguous universal human action and after the fact turning it into contempt. Such reasoning undermines the entire concept of guilt beyond reasonable doubt and thereby denies any process whatsoever to the hapless defendant.

ABA Criminal Justice Standard Relating to Trial by Jury, 15-3.1(c), Custody and Restraint of Defendants, Vol. III (Little Brown 2d. Ed.), states at 1582-1583:

> ". . . if a trial justice allows physical restraints to be used, the judge must state for the record the basis of the decision, and the record must state the trial judge's conclusions, and the record must

> support the trial judge's conclusions, either by way of the individual's conduct during trial or by way of evidence addressed out of the presence of the jury on the question of physical restraint. The hearing, although informal, makes it possible for the alleged facts justifying restraint to be made a matter of record and to be challenged by the party aggrieved."

Friel, at footnote 2 (App. 2), ignores sound judicial policy and disregards that a federal right was denied Petitioner Friel as an integral part of the finding of summary contempt. The premise that, "Friel does not challenge the exclusion itself on appeal", is without basis. Petitioner Friel asserted his 1st and 6th Amendment rights to a public trial and personally to participate in all matters of substance relentlessly (See, e.g., T.T. 6, 30-44, 101-107; T.T. 182-184; T.T. 386-387.) (T.T. 410, 441, 443, 447 [refusal of sidebar].) Friel further asserted these

fundamental rights on appeal and motion to reconsider both.

Under such circumstances, "where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass on the federal question" this Court may analyze the facts (Fiske v. Kansas, 274 U.S. 380, 385-386) and decide whether Petitioner Friel has been deprived by a State Court of a right secured by the Constitution. Norris v. Alabama, 294 U.S. 587, 590; Chambers v. Florida, 309 U.S. 227, 228-229.

It is in fact urgent that this Court review Friel because separating the removal issue from the contempt issue draws the

very life and breath out of both the defendant's right to participate and of his counsel's right to advocate at trial.

Nowhere in Friel, and nowhere in the record was any necessity to remove the defendant disclosed. Compelling circumstances might be presented where outrage to which the Court responds is open or visible. Here, the outrage was invisible to everyone but the trial judge. (T.T. 416-422.) Such a subjective determination is pregnant with danger for abuse, and defense counsel should not be required to react with excessive deference.

Where on a silent record the trial judge inexplicably removes the defendant from trial, the appearance of the exercise of authority under law is undermined. The judge's actions suggest to the world an

identification of some unknown personal offense with obstruction to law. The ability to articulate is a condition of the trial justice's "plenary control" as a practical and real matter. See generally United States v. Dinitz, 424 U.S. 600 (1975); Braxton v. United States, 395 A.2d. 759, 767; Oregon v. Kennedy, 456 U.S. 667, 673, 679 (1982). The trial judge in Friel resolutely refused to address facts, to articulate principle, or to communicate reasons.

That "due process" may not, arguendo have entitled Petitioner Friel to a full hearing on notice, does not mean he was not entitled to any process at all, to challenge "why the proposed action should not be taken as a fundamental due process requirement" (See, e.g., Cleveland Board of Education v. Laudermill, 84 L.Ed. 94

[1985]). Petitioner Friel was entitled to some explanation by the Fifth and Fourteenth Amendments to the U.S. Constitution. (T.T. 419.)

(B) Petitioner Friel explicitly premised his objection to summary contempt citation and exclusion also upon the First Amendment to the United States Constitution, (T.T. 410, 419, 441, 443, 447, 456).

The trial judge, a professing Roman Catholic of Record[6], was represented by the Attorney General in related proceedings

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[6]Transcripts of hearing July 17, 1984 (Andro Superior Court) were refused defendant Friel. They disclose that the trial judge stated he was Roman Catholic on July 17, 1985. Petitioners contend the counsel's question was proper but the only proper response was "it is immaterial" or "I am Roman Catholic, therefore disqualify".

during trial. (R. 369-370, 405; Friel v. State, Law Andro CV-84-333.) (M.T. 84, R. 316-318.)

"Trial before 'an unbiased judge' is essential to due process." Johnson v. Mississippi, 403 U.S. 212, 216. Withrow v. Larkin, 421 U.S. 35, 47, (1875) provides a per se prophylactic rule which must be invoked to guarantee due process of law when, "experience teaches that the probability of actual bias . . . is too high to be Constitutionally tolerable". Friel neglects to address the Constitutionally mandated standard of recusal. While Maine substantive case law (see, e.g. Brenglemann v. Land Resources, Me. 1978, 393 A.2d. 174) acknowledges this self-executing Constitutional rule of judicial disqualification, Friel disregards it without explanation.

> "For the proper administration of justice requires not only actual impartiality, but also the appearance of detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel. This right is impaired when a party is required to meet in his opponent an advocate who has already acted as the judge's counsel in the same litigation." Rapp v. Van Dusen, 350 F.2d. 806 (3rd Cir. 1965) at 812; See also Public Utilities Commission v. Pollack, 343 U.S. 451 (1952); Justice Frankfurter at 466-467.

The Rule of impartiality is applicable as a Constitutionall mandate under the 14th Amendment, when the trial justice invokes summary contempt powers:

> "The inquiry must be not only whether there was actual bias on the respondent's [trial judge's] part, but also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the Court and the interests of the accused. (Citations omitted.) Such a stringent rule may sometimes bar trial judges

> who have no actual bias, and would do their very best to weigh the scales of justice equally between the parties, but due process of law requires no less." Taylor v. Hayes, 418 U.S. 488 at 501 (emphasis added).

Dennis Eugene Friel is a highly publicized anti-Roman Catholic religious zealot. (See, e.g. R. 633-637, 51-84, 203-241, media). Thus before trial, Petitioner Friel asserted this trial would be "the first inquisition or heresy trial in the United States". (T.T. 16.)

Petitioner Friel's position before trial was: (1) The State's case inevitably brought in evidence of highly charged religious content, in particular, the Letter to the Churches, alleging union of Church and State under the Roman Catholic Pope; (2) the defense of reasonable alternative hypotheses (R. 99-101, 104-116,

134-135, 160-161, 162-164, 170, 184-187, 315-317, 349, 353-354, 369) brought in religious convictions of the Defendant. What if Petitioner Friel, like Martin Luther, placed his theses on a Cathedral door? (3) The involvement of a Roman Catholic trial judge disrupted the Court proceedings and violated Petitioner Friel's fundamental rights. A trial judge of Jewish faith hearing the claim of an alleged nazi charged with painting swastikas on synagogues would be mirror like.

Friel's First Amendment claim was born out at trial, e.g., citation of Friel for Bible, (T.T. 192); equation of exercise of faith with disruption of judicial process, (T.T. 13-14); warning that Friel raised religion in defense "at his peril" (M.T. 24); interpretation of evidence to jury as

"anti-religious", (T.T. 92-94); exclusion of Petitioner Friel from motions resulting in exclusion of fundamentalist jurors against Petitioner's will, (T.T. 38, 43-44, 92, 98-103, 107, 113, 123, 173-175, 187-188, 384-385), denial without address of Petitioner Friel's right to represent himself (T.T. 39-43, 98-103); declaration of a sua sponte mistrial without consulting Friel or his counsel, (T.T. 469).

> (T)he symbolic union of Church and State effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices . . ." See Grand Rapids School Dist. v. Ball, 105 S.Ct. 3216 (1985) at 3226.

Symbolic union in the Court is as Constitutionally impermissible as it is in

the schools. Under similar circumstances the historic writ of mandamus has been applied. See, e.g., Pulliam v. Allen, 104 S.Ct. 1970 (1984), citing King v. Emerson, [1913], 2 Ir. R. 377.

Point II

Assigned Trial Counsel May Not Be Held in Summary Contempt of Court By a Trial Judge Who Is or Will Be Publicly Perceived as Biased Based on Objective Evidence for (A) Consulting With His Excluded Client Absent Express Authorization in a Multi-Defendant Trial (B) Making a Record When His Client Is Removed Without Explanation for the Remainder of His Trial for Contemptuous Actions Not of Record During Trial; (C) a Tactical Decision Not to Crossexamine Five Witnesses; and (D) Asserting the Need to, but Not In Fact, Seeking a Federal Remedy.

(A) The Maine Supreme Judicial Court's affirmance in Campbell holds "Campbell's disruptive actions and statements on the several occasions when he left and then reentered the Courtroom were all part of

his continuing refusal to abide by the ruling of the Court in excluding his client from the proceedings. Campbell went far beyond the permissible bounds of advocacy in responding to [this] ruling of the Superior Court."

The trial transcript, however, discloses that counsel, when directed, remained in the Courtroom at all times, (T.T. 440-469), and that at no time did Campbell's exits or entrances disrupt the trial, (T.T. 414, 415, 416, 417, 420, 424-427, 431-432.), but the trial continued with celerity. Further, the trial judge at no time prohibited consultation with his client until after finding Campbell in contempt. (T.T. 417, 420, 425, 431-432,440.) Thus, Campbell's findings of fact, as earlier, in respect to the alleged "consultation" with the trial judge (T.T.

411-412) are again against the Record of trial. Under these circumstances, to hold Campbell's actions contempt, indulges a presumption that counsel should not consult with an excluded client.[7] This is to follow the erroneous principle lucas non lucendo. In the absence of prohibition counsel has the right to consult an excluded defendant for "the Sixth Amendment does not provide merely that a defense be made for the accused, it grants to the accused personally the right to make his defense". Faretta v. California, 422 U.S. 806, 809 (1975).

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[7] Campbell notes Campbell shook hands with a witness "for the State", (Appendix at), ignoring he was in fact of record a defense witness, (R. 435; T.T. 299); also that the trial judge warned "concerning Friel's Courtroom behavior", failing to note that the Court could point out no contemptuous behavior (T.T. 40-44.)

Campbell, in "Footnote 4", sub silentio decides the Constitutional issue of right to advise and consult counsel in the negative. (T.T. 441, 443, 456, 474-475.) A State Court cannot deprive a litigant of a federal right by omitting to pass upon basic questions of fact. Brooklyn Savings Bank v. O'Neill, 324 U.S. 635, 638.

(B) The Maine Supreme Judicial Court apparently also finds significant that Campbell stated to the Court (out of the presence of the jury) that "the facts, in open Court, are such as to give reasonable credence to what he [Friel] said", that the trial would be "the first inquisition trial in the United States". Counsel's assertion was a statement required to be made of record on the defendant's behalf and with the objective that the Court justify its

unexplained actions. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Richard Newspapers Inc. v. Virginia, 448 U.S. 555 at 572.

Petitioner Friel's removal for the remainder of his trial by this trial judge presented "a setting where the question arises whether the accused has rights of confrontation that the law invades at its peril." Illinois v. Allen, 397 U.S. at 353. (Justice Douglas concurring.) As stated in respect to The Trial of William Penn, 6 How. St. Tr. 951, 958-959:

> "Would we tolerate the removal of a defendant from the Courtroom during a trial because he was insisting on his Constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the bench that tried him? Would we uphold contempt in

> that situation? . . . It will be time enough to resolve those weighty problems when a political trial reaches this Court for review." Id. 397 U.S. at 356 (Justice Douglas concurring)[8].

(C) The trial judge stated, "If you make a conscious choice [to stand mute], you are, in effect, jeopardizing your professional status." and held Campbell in contempt. The trial judge further declared standing mute to constitute "a disregard for the interest of public justice" requiring revocation of the order of appointment of Campbell. (T.T. 475.)

Campbell did nothing after the initial citation other than to remain in the

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[8]William Penn expressly characterized his trial by the law-abiding men of his day as an inquisition. ". . . since the Spanish Inquisition hath so great a place in the Recorder's heart, God Almighty, who is just, will judge you for all these things."

Courtroom, alertly (T.T. 451), assert that the decision to stand mute was a tactical choice (T.T. 447, 456, 460, 461, 467), and request leave to go to Federal Court (T.T. 448, 468, 469). Thus, the primary basis for Petitioner Campbell being punished was the intentional tactical decision not to crossexamine.[9]

Such an order, however enforced, to defend offends "that respect for the individual which is the lifeblood of the law". Id. See Illinois v. Allen, 397 U.S. at 350-351, (Brennan, J. concurring) and turns the right to counsel into a contrivance against the accused. Id. See Faretta v. California, 422 U.S. at 834.

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[9]Campbell was "punished during trial just as surely as if his sentence had commenced immediately".

Campbell stands somewhere between Martin v. Rose, 744 F.2d. 1245 (1984 6th Cir.) and Warner v. Ford, 752 F.2d. 622 (1985 11th Cir.). Martin's trial counsel, as an intentional trial tactic, "stood mute" (Id. Martin, 744 F.2d. at 1249). The Sixth Circuit held "the failure of Martin's attorney to participate in the trial made the adversary proceeding unreliable", Id. at 1250, and recommended invocation of the contempt power to deter the tactic.

Warner v. Ford, 752 F.2d. 622 (1985 11th Cir.) distinguished Martin v. Rose, and observed that, "Silence can constitute trial strategy". Id. 752 F.2d. at 625.

Petitioners submit the intentional trial tactic to stand mute is a fundamental First, Fifth and Fourteenth Amendment right. See generally Faretta v.

California, 422 U.S. at 816, citing Snyder v. Massachusetts, 291 U.S. 97, at 106.

(D) An unfulfilled threat to go to Federal Court is not contempt. See In Re McConnell, 370 U.S. 230 (1962); United States v. Seale, 461 F.2d. 345, 363 (7th Cir. 1972); In Re Gustafson, 619 F.2d. 1354 (1980) at 1361. The defendant was jailed and denied even the right to testify, and counsel was under threat of arrest if he left the Court (T.T. 460), when he requested leave to seek a federal remedy.

Point Three

A Federal Court May Not, Consistent With Due Process, Issue an Order (A) Preventing Trial Counsel in a State Criminal Proceeding Not Under Jurisdiction of the Federal Court from Disclosure to the Defendant of a Federal Agent or Informant's Identity in the Defense Camp and Possible Activity in the Defense Camp in the State Court Proceeding; (B) From Advocacy of Prejudice in the State Court Proceeding.

Petitioner Friel, by Affidavit dated August 15, 1985, submitted on motion for reconsideration, (See "Law Court file" Friel) that Richard Hamilton, an investigator licensed under the authority of the Attorney General assigned over express objection (R. 42) by the trial judge (6/28/84) to investigate for the defense, was a federal informant; that trial counsel was precluded from disclosing this fact to Petitioner Friel until mid-July, 1985 by order of the U.S. District Court; that Petitioner Campbell's counsel in his contempt appeal, "are still under a Federal Court order in full force and effect, not to disclose this". Petitioner Campbell, in moving for reconsideration on behalf of Friel, stated, "Counsel does not join in assertions by Appellant Friel concerning Richard Hamilton, and expresses no opinion thereon except to note that he

has fulfilled his duty to communicate to Appellant all matters concerning his interests in any case upon which Campbell represents Appellant". (See "Law Court file", Docket Kno-84-360 at p. 23.) Petitioner Friel asserts such orders constitute a material interference with "the right of the accused personally to manage and conduct his defense in a criminal case". Id. Faretta v. California, 422 U.S. at 817.

Richard Hamilton was assigned by the Court to assist Friel in June, 1984 (R. 154). Petitioner Friel, through counsel, objected to appointment of a State licensed investigator to his defense, (R. 153-154) and was further denied funds to bring Hamilton to trial as a witness by rulings in chambers, from which Friel was excluded, over objection. (T.T. 5-8.)

The very nature of the orders asserted to exist by Petitioner Friel undermines the ability of Friel, an indigent, to assert prejudice. Such an order by definition prevents Campbell from advocating prejudice to Friel, and Campbell's counsel from advocating prejudice to Campbell. In context, [10] this is a per se obstruction, whether or not Petitioners ultimately could establish actual prejudice. The deterence of advocacy in such blanket orders is further inherent when the potential for making secret information already known by the defense is contemplated.

Petitioner Friel's affidavit establishes extraordinary circumstances posing continuing "great and immediate threat" to the federal "plaintiff's" Constitutional rights as defendant in the

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[10]See Footnote 1.

State Court proceedings," and achieves "a substantially disruptive effect upon contemporary state criminal proceedings". See, e.g., Ex Parte Young, 209 U.S. 123, at 243-244. Petitioners thus may require leave to petition for writ of mandamus pursuant to 28 U.S.C. §1651 directing the First Circuit and United States District Courts to release impoundment and secrecy orders, as may exist, as "necessary to enable [the Court] to exercise appellate jurisdiction." Marbury v. Madison, 1 Branch 137 at 175. "(A)ppeal is a clearly inadequate remedy". Ex Parte Fahey, 332 U.S. 258, 259, 260; Will v. United States, 389 U.S. 90, 106-107.

CONCLUSION

There can be no doubt that on the facts as shown by the record of this case

that deprivation of counsel of choice hangs like a Sword of Damocles over the entire proceedings, resulting from Petitioner Campbell's zealous advocacy of Petitioner Friel's rights. In a dynamic society based on the natural rights of the individual, the Courts must be open to those unbroken in spirit. At our peril does any Court deny them the right to a defense. Not only alleged contempt is at issue, but the wall between Church and State as it applies to the right to a defense. When the trial judge is a target, if not victim, of an alleged religiously motivated action, he must recuse. The Oath of Office requires no less. To require more would be to require "refined gold". The petition should be granted.

Respectfully submitted,

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APPENDIX ONE

STATE OF MAINE

v.

ANDREWS B. CAMPBELL

Argued March 14, 1985
Decided August 6, 1985

Before McKUSICK,* C.J., and NICHOLS, VIOLETTE, WATHEN, GLASSMAN and SCOLNIK, JJ.

VIOLETTE, J.

The defendant appeals from a judgment of criminal contempt entered against him after a summary proceeding in the Superior Court, Knox County. He contends that his conduct did not justify the finding of contempt, that the summary proceeding before the trial judge was improper, and that the court imposed an excessive sentence for the contempt. We disagree

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*McKusick, C.J., sat at oral argument and participated in the initial conference, but participated no further.

with the defendant's contentions and deny the appeal.

I.

On April 13, 1984, the Superior Court, Androscoggin County, appointed the defendant, attorney Andrews Campbell, to represent Dennis Friel in a criminal prosecution. A grand jury had indicted Friel and a co-defendant, Donald Lagasse, for committing aggravated criminal mischief by damaging the property of various churches.

On September 7, 1984, the case was transferred to Knox County. The jury trial of Friel and Lagasse began on September 10. Both before and during trial, Campbell and his client Friel repeatedly questioned the fairness of the proceedings and specifically challenged the impartiality of

the Superior Court justice. On several occasions, the presiding justice warned Friel and his attorney concerning Friel's courtroom behavior.

The courtroom behavior of attorney Campbell was also of concern to the presiding justice. On the second day of the trial, September 11, Campbell shook hands with a witness for the State as the witness was leaving the stand. The court instructed the jury not to draw any inferences from this gesture by defense counsel.

On the third day of the trial, September 12, after the presiding justice found Dennis Friel to be in contempt of court and had him removed from the courtroom, attorney Campbell questioned the basis of the court's action. When Campbell continued to protest, the presiding justice warned him that he would find him in

contempt as well if he did not cease his objections. At this point, the court announced that it would recess briefly.

After the recess, but before the jury returned to the courtroom, there was a discussion between the presiding justice and counsel concerning the contempt finding made against Friel. Campbell again protested the court's decision to find his client in contempt, and referred to the incident as a "judicial trap." Despite being interrupted by Campbell on more than one occasion, the court informed him that his client was barred from the courtroom and that the trial would continue. In a vigorous and lengthy continuation of his objections, Campbell made the following statements: he referred to the contempt finding directed at his client as "the most grave violation of the United States Constitution [he had] ever seen"; he urged

the presiding justice to disqualify himself from hearing the underlying criminal matter and to grant a mistrial; he indicated that he could not proceed "in good faith, . . . as a member of the Bar and as a lawyer," and observed that "it cause[d] [him] great grief to have to stay at a proceeding where the rulings have been as such as [the] Court has done"; he stated that, by choice, he would be in "the Maine Supreme Court or the First District Court of Appeals of the United States District Court [sic]"; and he indicated that he would remain mute throughout the remainder of the trial. The presiding justice observed that he was extremely concerned about Campbell's performance in representing his client, particularly his behavior concerning the contempt finding made against Friel. After the court indicated that the jury should be brought in so that the trial could be

resumed, Campbell informed the court of his intent to leave the courtroom to speak with his client and to remain mute throughout the rest of the trial. The presiding justice told Campbell that he would pursue such conduct "at his peril."

The jury was then brought into the courtroom. Campbell almost immediately requested a conference at sidebar to make an additional point regarding the contempt finding made against Friel and to request that "a transcript of all proceedings to date in this trial . . . be prepared on an expedited bases immediately." After the court deferred action upon this request, Campbell left the courtroom and the trial resumed.

A short time later, during the State's examination of a witness, Campbell returned to the courtroom and immediately interrupted the proceedings to request

permission from the court to leave again to consult with his client. The court refused to authorize such action and told Campbell to be seated. The presiding justice reminded Campbell that he had a duty to represent his client effectively in the matter before the court. Campbell remarked, "I don't think I need authorization, do I?" and left the courtroom again. Three minutes later Campbell returned to the courtroom. After listening to some testimony, he again interrupted the trial by stating, "Excuse me, Your Honor. I just want to talk to my client." Campbell then left the courtroom without comment from the presiding justice. He returned to the courtroom two minutes later.

A short time later, the presiding justice asked Campbell if he intended to cross-examine a witness. Campbell

responded, "Your Honor, I have already stated to the Court that my client and I --," at which point the court cut him off and excused the jury. The following exchange between the presiding justice and Campbell, culminating in the justice summarily finding Campbell to be in contempt of court, then took place:

> THE COURT: Before you begin, let me caution you, counsel. You are an attorney at law licensed to practice in the state of Maine.
>
> MR. CAMPBELL: I hope so.
>
> THE COURT: Let me finish, because it is very, very important that the record reflect what I am saying. As an officer of the court and an attorney at law, you are obligated to represent your interest or your client's interest with respect to any given case in a manner that is required of you as a lawyer.
>
> MR. CAMPBELL: I don't think anybody has ever done more than I have as a lawyer for this client.
>
> THE COURT: Let me finish. That would include being in this courtroom

whenever he's on trial to represent his interests and protect him.

MR. CAMPBELL: Your honor --

THE COURT: Let me finish, Mr. Campbell. And protect his interests fully by virtue of listening to the evidence that is offered against him during the course of trial, and, if necessary, to cross-examine any witness to make sure your client is duly protected and his interest is fully protected.

MR. CAMPBELL: May I respond?

THE COURT: You will have an opportunity to respond in due course. Let me finish.

MR. CAMPBELL: Of course.

THE COURT: That is when you say your client has ordered you to stand mute that, sir, does not permit you to stand mute.

MR. CAMPBELL: Your Honor, I made that decision myself.

THE COURT: Let me finish. If you make a conscious choice you are, in effect, jeopardizing your profession and your professional status.

MR. CAMPBELL: If this was a trial I think the Court, as I have said, has jeopardized his status under the Constitution. He's been denied the fundamental right to a fair trial. He's been booby trapped. All the

evidence indicates -- I don't know if he has been booby trapped, I have argued four times and he's been denied the right to a fair trial.

THE COURT: Mr. Campbell --

MR. CAMPBELL: Let me finish. The right to a fair trial, his interests are not to be subjected to what he has called an inquisition. In my opinion the facts in court, in open court, are such to give reasonable credence to what he has said. His decision, I will tell you mine, too, sir, is that his interests demand my being in the federal court. If I have to stay here I cannot get that man out of jail before he's put at Thomaston by this Court, and myself, possibly, sir, sentenced without any fair ground.

THE COURT: This Court does hereby find that you have committed contempt in the actual presence of this Court. I do hereby hold you in contempt. I sentence you to five days to the County Jail --

MR. CAMPBELL: Sir, that makes, that means my client can't get out.

THE COURT: That sentence will be stayed until such time as this trial is concluded or you, of your own choosing, are not here, whichever first occurs.

MR. CAMPBELL: I understand. Thank you.

THE COURT: I am going to take a five-minute recess.

MR. CAMPBELL: You may.

On September 13, the presiding justice filed an order of contempt pursuant to M.R. Crim. P. 42(a) reciting the facts underlying his finding of September 12 that Campbell was in contempt of court. Campbell appeals from the judgment of contempt entered against him.

II.

"A contempt of court has been defined as 'any act which is calculated to embarrass, hinder or obstruct the court in the administration of justice or to lessen its authority or dignity.'" State v. DeLong, 456 A.2d 877, 881 (Me. 1983) (quoting In re Holbrook, 133 Me. 276, 280, 177 A. 418, 420 (1935)); In re Bernard, 408

A.2d 1279, 1281 n.2 (Me. 1979). Under M.R. Crim. P. 42, contempt may be punished criminally in two different ways: summarily pursuant to Rule 42(a),[1] and after a plenary procedure pursuant to Rule 42(b).[2] Although the right of a court to

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[1]Rule 42(a) provides:

> **(a) Summary Disposition.** A criminal contempt may be punished summarily if the justice certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the justice and entered of record.

[2]Rule 42(b) provides:

> **(b) Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the justice in open court in the presence of the person charged or, on application of an attorney for the

punish contempt summarily is firmly established, see In re Bernard, 408 A.2d at 1282; United States v. Wilson, 421 U.S. 309, 319 (1975),[3] the exercise of this power is subject to definite limitations. By its own terms, Rule 42(a) restricts summary punishment of criminal contempt to situations where the presiding justice is able to certify that "he saw or heard the

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> state or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The person charged is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a justice, that justice is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

[3]Although Y and the other federal decisions cited infra concern Fed. R. Crim. P. 42(a), "M.R. Crim. P. 42(a) is almost identical to the federal rule of like number." In re Bernard, 408 A.2d at 1282 n. 6.

conduct constituting the contempt and that it was committed in the actual presence of the court." Further, because of the departure from the usual standards of due process inherent in a summary proceeding, a court may resort to summary punishment of contempt only where there is an actual and willful obstruction of the administration of justice. DeLong, 456 A.2d at 881-82; In re Bernard, 408 A.2d at 1282-83.

Where the alleged contemnor is an attorney representing a client before the court, due regard must be given to his right to act as a zealous advocate on his client's behalf. In re McConnell, 370 U.S. 230, 236 (1962); In re Dellinger, 461 F.2d 389, 397-401 (7th Cir. 1972). See generally Note, Attorneys and the Summary Contempt Sanction, 25 Me. L. Rev. 89, 90-98 (1973). "Attorneys must be given great latitude in the area of vigorous advocacy."

In re Dellinger, 461 F.2d at 398. Nevertheless, the exercise of the summary contempt power vested in the courts will be justified whenever it can "clearly be shown" that an attorney's conduct constitutes an "actual obstruction of justice." In re McConnell, 370 U.S. at 236; see, e.g., In re Steinberger, 387 A.2d 1121, 1124 (Me. 197- ; Alexander v. Sharpe, 245 A.2d 279, 283-84 (Me. 1968); Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, 552 F.2d 498, 509 (3d Cir. 1977).

In support of the finding of contempt, the presiding justice certified that he personally observed, inter alia, the actions and statements of attorney Campbell, in the actual presence of the court, on the several occasions when Campbell left the courtroom to speak with

his client and then returned, thereby repeatedly interrupting the trial, despite the court's express refusal to authorize Campbell to leave the proceedings to consult with his client. That conduct constituted an actual and willful obstruction of the administration of justice. See DeLong, 456 A.2d at 881-82. Campbell intentionally flouted the authority of the presiding justice to control the trial and its participants, and threatened the objectivity and celerity of the proceedings. Campbell's behavior created "an overriding need for immediate punishment to prevent the contumacious conduct from disrupting the orderly progress of the trial." In re Bernard, 408 A.2d at 1282.

Campbell, however, contends that his conduct during the trial was merely a vigorous defense, necessary to protect his

client's interests. Campbell also argues that, even if his conduct was objectively obstructive, it did not justify the summary finding of contempt because it was undertaken in good faith. Campbell concludes that, in light of the sixth amendment concerns involved in the representation of a criminal defendant, his conduct constituted permissible advocacy on behalf of his client, and provided an insufficient basis for the Superior Court's summary finding of contempt under Rule 42(a).

We reject Campbell's arguments. Campbell's disruptive actions and statements on the several occasions when he left and then reentered the courtroom were all part of his continuing refusal to abide by the ruling of the court excluding his client from the proceedings. Campbell went far beyond the bounds of permissible

advocacy in responding to this ruling of the Superior Court. As we have previously stated:

> When the Justice presiding over a trial makes a ruling, or determination, adverse to the position of counsel, "it is not counsel's right to resist it or to insult the judge - his right is only respectfully to preserve his point for appeal."

In re Steinberger, 387 A.2d at 1124 (quoting Sacher v. United States, 343 U.S. 1, 9 (1952)); see United States v. Lowery, 733 F.2d 441, 445-46 (7th Cir. 1984); Local Union 542, 552 F.2d at 506-09. After objection and vigorous argument had failed, Campbell was bound to accept the exclusion of his client from the courtroom and to continue to represent him in the courtroom, rather than engage in conduct that disrupted the orderly continuation of the trial.[4]

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[4]We express no opinion regarding whether a

Furthermore, Campbell cannot justify his conduct merely by asserting that it was undertaken in good faith. "McConnell cannot be read as an immunization for all conduct undertaken by an attorney in good faith representation of his client . . ." In re Dellinger, 461 F.2d at 398. Under the circumstances of this case, Campbell "should reasonably have been aware that his conduct was wrongful." Local Union 542, 552 F.2d at 510.

In summary, Campbell's conduct cited by the presiding justice constituted an

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court should or must provide opportunities for consultation between a criminal defendant and his attorney when the presiding justice has excluded the defendant from the courtroom. We merely observe that any such right to consultation would not authorize an attorney to wander in and out of a trial at will, thereby interrupting the proceedings, as Campbell did in this case. Furthermore, as we note above, the appropriate way to challenge an improper denial of such consultation would not be through defiance of the court's authority.

actual and willful obstruction of the administration of justice, personally observed by the presiding justice and committed in the actual presence of the court. Although we recognize the importance of zealous representation by counsel, such advocacy may not properly include the "willful . . . obstruct[ion] . . . of criminal proceedings, . . . misbehavior [that] not only brings the court into disrepute but also interferes with the orderly conduct of the court's business." In re Bernard, 408 A.2d at 1282. Campbell's conduct justified the finding of contempt.

III.

There is an inherent tension between summary disposition of a criminal contempt charge and the constitutional guarantee of

due process of law. See Taylor v. Hayes, 418 U.S. 488, 498-500 (1974); In re Bernard, 408 A.2d 1279, 1282 (Me. 1979); Note, Attorneys and the Criminal Contempt Sanction, 25 Me. L. Rev. 89, 94-98 (1973). We have acknowledged that "[i]n a summary contempt proceeding . . . we have the anolmalous situation of judge, jury and prosecutor combined in a single individual." In re Bernard, 408 A.2d at 1282. Accordingly, even where there is contumacious conduct sufficient to justify summary punishment -- that is, an actual and willful obstruction of the administration of justice, seen or heard by the presiding justice and committed in the actual presence of the court -- summary disposition may nevertheless be improper. The circumstances may require notice and a hearing before a different judge pursuant to M.R. Crim. P. 42(b).

A hearing before a different judge will be necessary if the trial judge "become[s] embroiled in a running controversy with [the contemnor]." Taylor, 418 U.S. at 501-03 & n.10 (both contemnor and trial judge displayed "marked personal feelings" throughout the trial); Mayberry v. Pennsylvania, 400 U.S. 455, 563-66 (1971) (trial judge was "target of [contemnor's] insolence" and "cruelly slandered" by him); Offutt v. United States, 348 U.S. 11, 14-17 (1954) ("infusion of animosity" in trial judge's treatment of contemnor); Sandstrom, 438 F.2d 1200, 1211-14 (11th Cir. 1984) ("trial judge had a pre-existing and very strongly held dislike for the petitioner"); cf. M.R. Crim. P. 42(b) ("If the contempt charged involves disrespect to or criticism of a justice, that justice is disqualified from presiding at the trial or hearing except

with defendant's consent."). Not every courtroom confrontation, however, rises to the level of "embroilment." See, e.g., Farmer v. Strickland, 652 F.2d 427, 438-39 (5th Cir. 1981) (trial judge exhibited "remarkable patience and restraint" and used summary contempt power only as a last resort despite "disrespectful and sarcastic comments made by the attorney"); Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, 552 F.2d 498, 514 (3d Cir. 1977) ("the trial judge exhibited patience and restraint, and . . . did not engage in wrangling or bickering, and used the summary contempt power only as a last resort"); In re Buckley, 110 Cal.3d 237, ___, 110 Cal. Rptr. 121, ___, 514 P. 2d 1201, 1214 (1973) ("considerable patience and control on the part of a judge faced with repeated impertinences of counsel");

Naunchek v. Naunchek, 191 Conn. 110, ___, 463 A.2d 603, 608-09 (1983) (trial judge exercised "considerable control and reasonable restraint in . . . response to the plaintiff's repeated violations of the court's orders").

Campbell contends that the presiding justice and he became embroiled in a running controversy leading up to the summary finding of criminal contempt. According to Campbell, the contact between the presiding justice and him, and his client as well, created a strong likelihood of bias on the part of the justice against him. Campbell argues that due process requires a plenary hearing on the contempt charge before a different, impartial justice pursuant to M.R. Crim. P. 42(b).

Campbell's position is unpersuasive. After a careful examination of the record, we conclude that the presiding justice

displayed exemplary patience and restraint in dealing with Campbell's conduct. We are convinced that the presiding justice used the summary contempt mechanism only as a last resort to restore order and dignity in the courtroom. The presiding justice did not quarrel with Campbell or otherwise depart from an appropriate judicial demeanor; nor was he subjected to a personal attack by Campbell that would necessarily call his impartiality into question. The involvement between the presiding justice and Campbell does not require referral of the contempt charge to another justice.

Campbell also contends that a summary proceeding was unnecessary in this case because the punishment for the contempt, a five day jail sentence, was stayed until after the conclusion of his client's trial. Campbell argues that a plenary hearing on

the contempt charge before a different justice pursuant to M.R. Crim. P. 42(b) is therefore required.

Admittedly, "where conviction and punishment are delayed, 'it is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable [the court] to proceed with its business.'" Taylor, 418 U.S. at 498-99 (quoting Groppi v. Leslie, 404 U.S. 496, 504 (1972)) (emphasis added); see also Codispoti v. Pennsylvania, 418 U.S. 506, 515 (1974); United States v. Lumumba, 741 F.2d 12, 15-17 (2d Cir. 1984). In the case at bar, however, adjudication of the contempt and sentencing were not postponed. Campbell was punished during trial, to preserve the order and dignity of the proceedings, just as surely as if his sentence had commenced immediately or he had been fined. We "attach . . . no

special significance to the deferral of the execution of [Campbell's sentence." Naunchek, 191 Conn. at ___, 463 A.2d at 607 n.6. Rather, we observe that, because Campbell was acting as the trial attorney for a criminal defendant at the time of the finding of contempt and sentencing, "the efficient administration of justice was served by deferring execution until the conclusion of the . . . trial."[5] Id.

IV.

"Punishment for criminal contempt is clearly within the sound discretion of the sentencing court." State v. DeLong, 456

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[5]In fact, when the court sentenced him for contempt, Campbell remarked, "Sir, . . . that means my client can't get out." At this point, the presiding justice informed Campbell that he would stay the sentence "until such time as this trial is concluded or you, of your own choosing, are not here, whichever first occurs."

A.2d 877, 882 (Me. 1983); State v. Alexander, 257 A.2d 778, 782 (Me. 1969). "The seriousness of the consequences of the contemptuous behavior, the public interest in supporting judicial power to maintain order and decorum in the courts of justice and adequate deterrence of future defiance of judicial authority by the [contemnor] and others are all matters for the sentencing judge to take into consideration in his exercise of a sound judicial discretion." Alexander, 257 A.2d at 782.

Campbell contends that his sentence of five days in the county jail is excessive. After examining the record, however, we conclude that, in light of the relevant factors, "the penalty imposed . . . bear[s] [a] reasonable relationship to the nature of the contumacious conduct." Id. The presiding justice did not abuse his discretion in sentencing Campbell.

The entry is:

Judgment affirmed.

All concurring.

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APPENDIX TWO

STATE OF MAINE

v.

DENNIS EUGENE FRIEL

Argued April 30, 1985
Decided August 6, 1985

Before McKUSICK, C.J.,* and NICHOLS, ROBERTS, VIOLETTE, GLASSMAN and SCOLNIK, JJ.

VIOLETTE, J.

The defendant appeals from a judgment of criminal contempt entered against him after a summary proceeding in the Superior Court, Knox County. He challenges the basis for the finding of contempt, and argues that the summary procedure before the presiding justice was improper. We deny the appeal.

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*McKusick, C.J., sat at oral argument and participated in the initial conference, but participated no further.

I.

An Androscoggin County grand jury indicted the defendant, Dennis Eugene Friel, and Donald Lagasse for committing aggravated criminal mischief by damaging the property of various churches. The case was transferred to the Superior Court, Knox County, and a jury trial of both parties began on September 10, 1984. On the third day of the trial, September 12, the presiding justice found Friel in contempt of court, sentenced him to three days in the county jail, and had him removed from the courtroom. On September 13, the presiding justice issued an order pursuant to M.R. Crim. P. 42(a) reciting, inter alia, the following facts.

On September 7, Friel was present at pre-trial hearing. Friel repeatedly placed his fingers in his ears when the justice

spoke to him, referred to the justice as a "crooked judge," and placed his false teeth on the end of his tongue and stuck both teeth and tongue out at the bench.

On September 10, before the commencement of jury selection, the justice warned Friel that he would not permit his disrespectful behavior to interfere with the trial. Friel responded with laughter. Once again, Friel placed his fingers in his ears when the court addressed him. When the court denied one of Friel's motions, Friel made a loud grumbling sound. A short while later, he repeated this sound. In the middle of the proceedings, Friel abruptly rose and handed a note to a newspaper reporter. At the end of the day, at the request of Friel's attorney, Friel was permitted to address the court. Friel began speaking in a loud and agitated manner. When the justice was speaking,

Friel loudly responded with "I will leave, I do not like your pukey face," "keep it to yourself," and "(inaudible) catholic." Friel then left the courtroom, only to return a short time later to wander from the back of the courtroom to the defendants' table.

On September 11, Friel was forty minutes late for the start of trial. During trial, Friel placed a Bible on the railing next to him, in the immediate view of the jury, and pointed to it. When the justice directed Friel to remove the Bible, both he and his counsel objected loudly that it was only the Bible. During cross-examination of a witness by Friel's attorney, the witness stated, "What you're saying [is] that I lied about these people." At this point, Friel interrupted the cross-examination and said, "Yes."

On September 12, Friel repeatedly made facial grimaces, snorts of disgust, and loud sighs during the court proceedings. During a bench conference, Friel stood up, announced that he "had to piss" and walked out of the back of the courtroom. Upon his return, Friel walked up to the bench conference, stopped, and glared at the justice. The justice informed Friel's attorney that he would not permit Friel to walk in and out of the courtroom whenever he pleased. Friel's attorney then returned to the defendants' table and conferred with his client. Then, directing his actions toward the bench, Friel lifted his hand with his middle finger pointing upwards and stated, smirkingly, "Next time I will ask to go number one." It was at this point that the court found Friel in contempt, sentenced him, and had him removed from the courtroom.

II.

In our recent decision of State v. Campbell, we discussed what type of conduct can justify a summary finding of criminal contempt under M.R. Crim. P. 42(a).[1] No. ___, slip op, at 7-12 (Me. ___ __, 1985). We have no doubt that summary contempt proceedings were justified in this case based upon Friel's courtroom behavior.[2]

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[1]Rule 42(a) provides:

> **(a) Summary Disposition.** A criminal contempt may be punished summarily if the justice certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the justice and entered of record.

[2]We do not consider the question of whether it was proper for the presiding justice to exclude Friel from his own criminal trial. See generally Illinois v. Allen, 397 U.S. 337 (1970). Friel does not challenge the exclusion itself on appeal. We address only whether the summary finding of contempt preceding the exclusion of Friel

(footnote continued)

See id. The presiding justice certified that he personally observed Friel's actions and statements, in the actual presence of the court, on September 12 when Friel left the courtroom, apparently to use the bathroom, and upon his return. That conduct amounted to an actual and willful obstruction of the administration of justice committed in the actual presence of the court. See id. at 10. Through his actions and words, in open court and before the jury, Friel intentionally demeaned the court, "and threatened the objectivity and celerity of the proceedings." Id. This behavior, in the context of the pattern of disrepsectful and disruptive courtroom conduct that Friel had established throughout the litigation, "created 'an overriding need for immediate punishment to

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(footnote continued from previous page)
from the courtroom was proper.

prevent the contumacious conduct from disrupting the orderly progress of the trial.'" Id. (quoting In re Bernard, 408 A.2d 1279, 1282 (Me. 1979)). Friel's conduct therefore provided sufficient grounds for the summary contempt finding.

III.

Anticipating that we might find that his behavior justified the summary finding of criminal contempt, Friel next argues that the summary contempt proceeding was nevertheless improper because he and the presiding justice "bec[a]me embroiled in a running controversy." State v. Campbell, No. ___, slip op, at 13 (Me. ___ __, 1985) (quoting Taylor v. Hayes, 418 U.S. 488, 501-03 (1974)). According to Friel, due process requires a plenary hearing on the contempt charge before a different,

impartial justice pursuant to M.R. Crim. P. 42(b) because of the likelihood that the presiding justice was biased against him.

Based upon the authorities we discussed in Campbell, slip op. at 12-14, we conclude that the involvement between Friel and the presiding justice does not require referral of the contempt charge to another justice. As we stated in Campbell:

> After a careful examination of the record, we conclude that the presiding justice displayed exemplary patience and restraint in dealing with [Friel's] conduct. We are convinced that the presiding justice used the summary contempt mechanism only as a last resort to restore order and dignity in the courtroom. The presiding justice did not quarrel with [Friel] or otherwise depart from an appropriate judicial demeanor . . . .

Id. at 14-15. We acknowledge that this case, more so than Campbell, involves personal attacks upon the justice by the contemnor. These attacks, however, do not

approach the vituperativeness displayed in Mayberry v. Pennsylvania, where the United States Supreme Court determined that the trial judge was so "vilified" by the contemnor that he "necessarily [became] embroiled in a running, bitter controversy" with him. 400 U.S. 455, 465 (1971).[3] There was no embroilment between Friel and the presiding justice that would require a

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[3]Furthermore, in Mayberry, the trial judge delayed the summary contempt proceeding until after trial. The Supreme Court stated that, although it was improper for the trial judge to act upon the contempt charge after trial, he could, "with propriety," have disposed of it himself during trial. 400 U.S. at 463. Regarding instant treatment of contempt, the Supreme Court remarked:

> Moreover, we do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of a case.

Id. In the case at bar, the presiding justice acted upon the contempt during trial.

plenary proceeding on the contempt charge before another justice.

The entry is:

Judgment affirmed.

All concurring.

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APPENDIX THREE

STATE OF MAINE
Knox, ss.

SUPREME JUDICIAL COURT
Sitting as the Law Court
Law Docket No. Kno-84-361

STATE OF MAINE :
:
v. : Order
:
ANDREWS B. CAMPBELL :
:

Upon motions of the Defendant, Andrews B. Campbell, for reconsideration and for stay in execution of the sentence,

IT IS ORDERED that (a) the motion for reconsideration be, and it hereby is denied; and (b) the execution of the sentence in this cause be, and it hereby is, stayed pending the filing by the Defendant, Andrews B. Campbell, of a petition for writ of certiorari; provided, however, that the said stay shall expire at midnight on September 30, 1985, if such a petition has not by that time been filed by

him with the Clerk of the Supreme Court of the United Staes.

The receipt by the Clerk of the Law Court of an order granting a petition for writ of certiorari shall be effective to continue the said stay until final disposition of the matter by the Supreme Court of the United States.

Dated August 26, 1985.

FOR THE COURT:

s/ David A. Nichols
Associate Justice

APPENDIX FOUR

STATE OF MAINE
Knox, ss.

SUPREME JUDICIAL COURT
Sitting as the Law Court
Law Docket No. Kno-84-360

STATE OF MAINE :
:
v. : Order
:
DENNIS E. FRIEL:
:

Upon motions of the Defendant, Dennis E. Friel, for reconsideration and for stay in execution of the sentence,

IT IS ORDERED that (a) the motion for reconsideration be, and it hereby is denied; and (b) the execution of the sentence in this cause be, and it hereby is, stayed pending the filing by the Defendant, Dennis E. Friel, of a petition for writ of certiorari; provided, however, that the said stay shall expire at midnight on September 30, 1985, if such a petition has not by that time been filed by him with

the Clerk of the Supreme Court of the United Staes.

The receipt by the Clerk of the Law Court of an order granting a petition for writ of certiorari shall be effective to continue the said stay until final disposition of the matter by the Supreme Court of the United States.

Dated August 26, 1985.

FOR THE COURT:

s/ David A. Nichols
Associate Justice

APPENDIX FIVE

STATE OF MAINE Knox, ss.	SUPERIOR COURT CR-84-369
State of Maine vs. Dennis Eugene Friel and Donald Lagasse	))) AFFIDAVIT AND ORDER))))

I, Stephen L. Perkins, pursuant to M.R. Crim. P. 42(A), do hereby certify and swear that Dennis E. Friel, in my immediate view and presence, repeatedly engaged in conduct which embarrassed, hindered and obstructed the proper administration of justice in the matter of State of Maine vs. Dennis E. Friel, et al, CR-84-369. The following examples are representative of Mr. Friel's conduct during the pretrial and trial stages of the State of Maine vs. Dennis E. Friel, et al, CR-84-369:

1. Throughout all of the proceedings, Mr. Friel refused to stand when I entered the courtroom.
2. On 9/7/84, during the course of a hearing, Mr. Friel:
   - repeatedly placed his fingers in his ears when I spoke to him;
   - referred to me as a "crooked judge";
   - placed his false teeth on the end of his tongue out at the Bench;
   - made frequent, disrespectful noises and gestures.
3. On 9/10/85, prior to the start of the jury selection process, I explicitly warned Mr. Friel that I would not permit his disrespectful conduct to interfere with the trial. Mr. Friel responded with laughter. At one point, Mr. Friel placed his fingers in his ears

when I spoke to him. At approximately 3:30 p.m., after I denied one of his motions, Mr. Friel made a loud grumbling sound. A short while later, Mr. Friel make anouther grumbling sound. I asked Mr. Friel if he had anything to say. He responded with an outburst which concluded with "you asked, you got it." At another time, Mr. Friel directed a deep and gruff "Hey" at one of his children in the back of the courtroom. In the middle of the Court's business, Mr. Friel abruptly rose, walked across the courtroom and handed a handwritten note to a newspaper reporter. At the end of the day, after continued requests from Mr. Friel's counsel, I permitted Mr.

Friel to address the Court. Mr. Friel began speaking in a loud and agitated manner. When I was speaking, Mr. Friel loudly responded with "I will leave, I do not like your pukey face," "keep it to yourself" and "(inaudible) catholic." Mr. Friel then proceeded to walk out of the courtroom, only to return in a short while and wander from the back of the courtroom to the defendants' table.

4. On 9/11/84, Mr. Friel was 40 minutes late for the start of the trial. After the jury was sworn in, he placed a bible on the railing located next to him and in immediate view of the jury. He then looked at the jury and pointed to the bible. When I

directed Mr. Friel to remove the bible, both he and his counsel loudly objected that it was only the bible. During the cross-examination of Mr. Ancona asked "what you're saying (is) I lied about these people." At this point, Mr. Friel interrupted the cross-examination and said, "Yes."

5. On 9/12/84, Mr. Friel continued with his facial grimaces, snorts of disgust and loud sighs. During a bench conference, Mr. Friel stood up, announced that he "had to piss" and walked out of the back of the courtroom. Upon his return, Mr. Friel walked up to the bench conference, stopped, and glared at me. At that time, I informed Mr. Friel's attorney, Mr. Campbell, that I would not permit

Mr. Friel to walk in and out of the courtroom whenever he desired. Mr. Campbell then returned to the defendants' table and conferred with Mr. Friel. Then, directing his actions toward the Bench, Mr. Friel lifted his hand with his middle finger pointing upwards and stated, smirkingly, "Next time I will ask to go number one." At this point, I cited Mr. Friel for contempt. When he was taken into custody, Mr. Friel screamed, "Three days for taking a piss" and "Communist Nazi."

IT IS ORDERED that the defendant, Dennis E. Friel, is guilty of contempt and is sentenced to three days in the Knox County Jail.

Dated: September 13, 1984

s/ Stephen Perkins
Justice of the
Superior Court

APPENDIX SIX

STATE OF MAINE Knox, ss.	SUPERIOR COURT Docket No. CR-84-369
State of Maine vs. Dennis Eugene Friel and Donald Lagasse	))) AFFIDAVIT AND ORDER))

I, Stephen L. Perkins, pursuant to M.R. Crim. P. 42(A), do hereby certify that Attorney Andrews B. Campbell, in my immediate view and presence, displayed complete and blatant disregard for the proper administration of justice in the matter of State of Maine vs. Dennis E. Friel, et al, CR-84-369. Prior to the start of the trial and during the course of the trial, I made it very clear to Mr. Campbell that he had an obligation, as an attorney licensed to practice in the State of Maine, to fully represent the best interests of his client. I also made it

very clear to Mr. Campbell that, as an officer of this court, he must discharge this obligation in an professional and ethical manner.

Prior to the incidents which resulted in Mr. Campbell's being found in contempt of this court, Mr. Campbell acted in an unprofessional and disruptive manner. After I excused one of the state's witnesses, Mr. Kenneth McDonald, Mr. Campbell reached across the railing and shook Mr. McDonald's hand as he walked past. This occurred directly in front of the jury.

After citing Mr. Cambpell's client, Mr. Friel, for contempt, Mr. Campbell's conduct was nothing short of outrageous. In the middle of the codefendant's cross-examination of a witness, Mr. Campbell stood up and told the Court that he had to leave the courtroom to speak to his client.

I instructed Mr. Campbell that he was interrupting the trial and that he should be seated. Mr. Campbell then asked if he could leave the courtroom. I informed Mr. Campbell that I wouldn't authorize him to leave the courtroom and that he had an obligation to represent his client in this matter. Mr. Campbell then responded with "I do not think I need authorization" and left the courtroom. In at least four more incidents, Mr. Campbell interrupted the course of the trial by walking in and out of the courtroom. When I asked Mr. Campbell if he wished to cross-examine the state's witness he replied "I stand mute." He repeated this response at least three times while in the presence of the jury. Additionally, Mr. Campbell stated that he had to go to Federal Court in Boston on matters regarding this case.

At 10:38 a.m. on 9/12/84, I warned Mr.

Campbell that his behavior was jeopardizing both his client and his own professional status. Mr. Campbell interrupted me seven times. Mr. Campbell gave no indication that he would attempt to represent his client in the appropriate manner. Further, Mr. Campbell informed this court that his client's interest demanded his being in Federal Court.

For the above reasons, I do hereby find Andrews B. Campbell, Esq. to be guilty of contempt of court and hereby ORDER that he be sentenced to a term of five (5) days at the Knox County Jail.

Dated: September 12, 1984

s/ Stephen Perkins
Justice of the
Superior Court

Supreme Court, U.S.
FILED
NOV 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-537

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANDREWS B. CAMPBELL
and
DENNIS EUGENE FRIEL,
Petitioners

v.

STATE OF MAINE,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether, contrary to the holding of the Supreme Judicial Court of Maine, the trial justice who summarily cited Petitioners for contempt was biased.

(2) Whether, although not raised in the Supreme Judicial Court of Maine, Petitioner Friel was denied due process by the failure of the trial transcript to contain a description of certain of the contemptuous conduct of Petitioner Friel, when the record as a whole does contain such a description.

(3) Whether the Supreme Judicial Court of Maine correctly found the evidence was sufficient to sustain Petitioner Campbell's contempt conviction.

(4) Whether this Court should review the propriety of a federal court order to which Respondent is not a party, which is not relevant to either Petitioner's contempt conviction, which was not timely brought to the attention of the Supreme Judicial Court of Maine, and upon which in any event that court could have made no judgment.

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III. THE SUPREME JUDICIAL COURT OF MAINE CORRECTLY FOUND THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONTEMPT CITATION OF PETITIONER CAMPBELL.

IV. THIS COURT SHOULD NOT REVIEW THE PROPRIETY OF A FEDSERAL COURT ORDER TO WHICH RESPONDENT IS NOT A PARTY, WHICH IS NOT RELEVANT TO EITHER PETITIONER'S CONTEMPT CONVICTION, WHICH WAS NOT TIMELY BROUGHT TO THE ATTENTION OF THE SUPREME JUDICIAL COURT OF MAINE, AND UPON WHICH IN ANY EVENT THAT COURT COULD HAVE MADE NO JUDGMENT.

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OPINIONS BELOW

The opinions of the Supreme Judicial Court of Maine, affirming the convictions of contempt as to each Petitioner, are published as State of Maine v. Andrews B. Campbell, 497 A.2d 467 (Me. 1985), and State of Maine v. Dennis Eugene Friel, 497 A.2d 475 (Me. 1985). The opinions are reproduced as Appendix One and Appendix Two, respectively, of the Petition for Writs of Certiorari. An "AFFIDAVIT AND ORDER" had been prepared in each case by the trial justice in the Maine Superior Court, certifying the grounds upon which he relied in finding each Petitioner in contempt. These are reproduced in the Petition for Writ of Certiorari as Appendix Five (as to Petitioner Friel) and Appendix Six (as to Petitioner Campbell).

JURISDICTION

The judgments of the Supreme Judicial Court of Maine in State of Maine v. Andrews B. Campbell, 497 A.2d 467 (Me. 1985), and State of Maine v. Dennis Eugene Friel, 497 A.2d 475 (Me. 1985), were entered on August 6, 1985, and the court's mandate issued the same day. On August 26, 1985, the court, as to both cases, denied motions for reconsideration and stayed execution of the sentences. The stays were to expire on September 30, 1985, unless before that date petitions for writs of certioriari were filed in this Court. A joint Petition for Writs of Certiorari was filed September 27, 1985. The stays have remained in effect pending disposition of the case by this Court. Upon request by Respondent for an

extension of time to file a brief in opposition to the Petition for Writs of Certiorari, the Clerk of this Court on October 16, 1985, granted an extension until November 25, 1985, pursuant to U.S. Sup. Ct. Rule 29.4. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND PROCEDURAL RULE

Fourteenth Amendment, United States Constitution: "...nor shall any State deprive any person of life, liberty, or property without due process of law...."

Rule 42(a), Maine Rules of Criminal Procedure:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the justice certifies that he saw or heard the conduct constituting the contempt and that it was committed in

> the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the justice and entered of record.

STATEMENT OF THE CASE

Respondent does not accept the "STATEMENT" in the Petition for Writs of Certiorari at 8-30.[1] Respondent accepts

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[1] U.S. Sup. Ct. Rule 21.5 provides: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." The "STATEMENT" as well as the arguments associated with each of the three points in the Petition are replete with irrelevancies, inaccuracies, miscitations, misquotations, erroneous or misleading statements, and distortions of the record.

These alone should be reason enough for the Court not to exercise its discretion in favor of review, although to become bogged down in all of these may divert the Court's attention from consideration whether the Petition otherwise has merit. But Respondent does not wish the Court to

the statements of fact as described by the Maine Supreme Judicial Court in State v. Campbell, 497 A.2d at 469-71, App. at 1-2 to 1-11; and State v. Friel, 497 A.2d at 476-77, App. at 2-2 to 2-5, wishing only to elaborate briefly on them.

It is true that Petitioners had asked the trial justice to recuse himself, solely because he was a Roman Catholic. Yet at the outset of a pre-trial motions hearing on September 7, 1984, Petitioner Campbell stated that he "will respect the Court's ruling and you personally. I respect your faith and integrity." (M.T. at 25.) Even after repeated misbehavior by Petitioner

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conclude it has failed to recognize the abuses of the record or has acquiesced in them. Therefore, in the footnotes in this brief in opposition the State will note some of the errors.

Friel during that hearing, Petitioner Campbell said he would "[w]ant to thank the Court for its latitude so far today and politeness." (M.T. at 97.) Then after further misconduct by Petitioner Friel during jury selection on September 10, 1984, and after Petitioner Friel had not arrived on time for trial the next day, Petitioner Campbell stated to the trial justice:

> I have differed with my client in many cases. I believe the Court has shown great respect for them as persons and in its dealings, and sometimes it's not reciprocated, and I have no excuse or apology to offer for their behavior in that respect.

(T. at 182.) Co-counsel agreed both defendants had been angry and disrespectful. (T. at 185, 186.)

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE SUPREME JUDICIAL COURT OF MAINE CORRECTLY REJECTED THE CONTENTION THAT THE TRIAL JUSTICE WAS BIASED.

Point I (which by its terms applies only to Petitioner Friel) and Point II (which by its terms applies only to Petitioner Campbell) share in common the premise that the trial justice was not impartial. Although phrased somewhat differently, both points assert that such bias was objectively ascertainable. The very premise upon which Petitioners' arguments are constructed is unsupported by the record.

What is claimed to be clear from an objective viewing has, in fact, been

perceived throughout these proceedings only by Petitioners. The Maine Supreme Judicial Court rejected any such view of the trial justice, instead finding he "displayed exemplary patience and restraint" and "did not quarrel with Campbell [or Friel] or otherwise depart from an appropriate judicial demeanor." State v. Campbell, 497 A.2d at 474, App. at 1-25; State v. Friel, 497 A.2d at 477-78, App. at 2-9. Similarly, in a pre-trial hearing on a mandamus petition of Petitioner Friel to recuse the trial justice, a single Justice of the Maine Supreme Judicial Court had found any prophylactic rule of Withrow v. Larkin, 421 U.S. 35 (1975), inapplicable because the trial justice could act "with complete impartiality." Friel v. State of

Maine, No. CV-84-856 (Sept. 5, 1984) (Scolnik, J.). (R. at 426-428.)[2]

The premise upon which both Points I and II of the Petition are based also is belied by the words of Petitioner Campbell himself. These are set forth in this brief in opposition in the STATEMENT OF THE CASE above. The record in this case does not contain a single harsh or intemperate word spoken by the trial justice to either Petitioner, and neither Petitioner has cited any. In these respects, although Petitioners appear to rely on them, this case is plainly far different from the extraordinary circumstances of both Taylor

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[2] The Petition at 26-27 thus errs in stating this mandamus action was "still pending during trial." The dismissal by Justice Scolnik was before trial.

v. Hayes, 418 U.S. 488 (1974), and Mayberry v. Pennsylvania, 400 U.S. 455 (1971).[3]

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[3] Supposedly as an example of the trial justice's lack of fairness, the Petition at 27-28 suggests that Petitioner Friel was, against his will, excluded from the trial court's "opening address to the jury" and "challenges to the jury." But the transcript reflects no absence of Petitioner Friel during the address to the jury. (T. at 44-64) The court did exclude Petitioner Friel from pre-trial chambers conferences, but at no time were challenges to the jury there made. The only time Petitioner Friel was absent from jury voir dire was when he himself twice chose to leave. The first time was when he and his codefendant apparently had gone to get something to eat. (T. at 116-122.) The second was when Petitioner Friel said to the trial justice, "I'll leave. I don't like your pukey face." (T. at 170.)

As another claimed example of unfairness, the Petition at 23 states that "the only discussion [concerning the contempt citation of Petitioner Friel] occurred while Campbell was not present," citing T. at 411-412. It would be more accurate to say that the trial justice began speaking with the codefendant's attorney, because Petitioner Campbell was late returning to the courtroom, about the codefendant's status now that Petitioner

Unlike those cases, there was here, as the Maine Supreme Judicial Court found, no embroilment by the trial justice with either Petitioner in a running controversy. State v. Campbell, 497 A.2d at 473-74, App. at 1-22 to 1-25; State v. Friel, 497 A.2d at 477-78, App. at 2-8 to 2-11.

There is not the slightest hint that the trial justice did not, in fact, try the case fairly, and neither Petitioner contends otherwise. Indeed, the court went out of its way to assure that Petitioner Friel and his codefendant were fairly

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Friel had been removed from the courtroom. After Petitioner Campbell returned, the trial justice told him he did not want "to get into the facts and circumstances of the reasons of my finding [Petitioner Friel] in contempt." (T. at 414.) Petitioner Campbell at length expressed himself on what had occurred. (T. at 413-418.)

tried. For example, upon Petitioner Campbell's expressing concern about security measures at the courthouse, the trial justice sought to negate any inference the jury array might draw that the security measures were used because the defendants were especially dangerous. (T. at 44-45.) And during trial, after a witness had failed adequately to identify Petitioner Friel as the State had expected, the court instructed the jury "to totally disregard her identification of these individuals...." (T. at 406.)

Petitioners instead seek to allege that there was an appearance of bias by the sole fact that the trial justice is a Roman Catholic and Petitioner Friel adheres to rabid anti-Catholicism. The Petition at 42

simply characterizes important principles enunciated in Withrow v. Larkin, 421 U.S. at 47; Taylor v. Hayes, 418 U.S. at 501; and Johnson v. Mississippi, 403 U.S. 212, 216 (1971), as "self-executing," as if merely invoking axioms relating to an appearance of bias is sufficient to require disqualification of a judge. This Court has never accepted such an obviously illogical proposition.[4]

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[4] The Petition at 42 implies that the Maine Supreme Judicial Court "acknowledges" that principles of judicial disqualification are self-executing, citing Brengelmann v. Land Resources, 393 A.2d 174 (Me. 1978). This is erroneous. The Maine court there recognized the teachings of Withrow v. Larkin, supra, but after exploring the facts behind the appellant's motion to recuse the trial justice in that case held that judicial disqualification was not warranted.

For example, only after careful examination of the historical facts in Johnson v. Mississippi, supra, did this Court reverse the appellant's contempt citation. The Court observed that the trial judge there "immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits and a losing party at that." 403 U.S. at 215. By contrast, a federal suit by Petitioner Friel against the trial justice in the present case was dismissed without a hearing before trial. The Court of Appeals later affirmed the dismissal in an unreported decision. Friel v. Scales, No. 84-1743 (1st Cir. Feb. 15, 1985) (per curiam).

Petitioners' assertions are no more or less than that judicial bias must be found, and so a trial judge must be disqualified, whenever a trial judge's tenets of faith are in conflict with a defendant's strongly held beliefs. Not only is such a position without merit as a general proposition, but the record here does not support the conclusion that the trial justice should have recused himself. First, the trial justice repeatedly sought to remove any issue of religion from the trial. (M.T. at 20-21, 24; T. at 13-14, 34-35.) Second, Petitioner Friel was tried jointly with a codefendant. The trial justice had a duty to preside over the codefendant's trial also, and nothing suggests the codefendant held any views like Petitioner Friel's

towards Catholics. Petitioner Friel specificially did not want his case severed from his codefendant's. (M.T. at 92-93.) Third, although Petitioner Campbell also relies on a claimed religious bias of the trial justice, there is nothing to show that he shared Petitioner Friel's anti-Catholic bigotry. On the contrary, he stated his respect for the court's faith. (M.T. at 25.) Petitioner Campbell can hardly assume a position applicable, if at all, only to Petitioner Friel. Fifth, Petitioner Friel's religious beliefs cannot excuse his misbehavior or be a defense to his contempt conviction. E.g., In re Chase, 468 F.2d 128, 134 (7th Cir. 1972), id. at 140 (Stevens, J., dissenting).

In short, Petitioners' argument is premised upon the trial justice having been in fact or by appearances biased. The Maine Supreme Judicial Court, however, correctly applied pertinent decisions of this Court and found otherwise.

II. PETITIONER FRIEL DID NOT RAISE IN THE SUPREME JUDICIAL COURT OF MAINE ANY ARGUMENT THAT HE WAS DENIED DUE PROCESS BY THE FAILURE OF THE TRIAL TRANSCRIPT, IN CERTAIN RESPECTS, TO CONTAIN A DESCRIPTION OF CERTAIN OF HIS CONTEMPTUOUS CONDUCT, WHICH IN ANY EVENT IS IN THE RECORD AS A WHOLE.

Point I of the Petition by its terms applies only to Petitioner Friel. As best Respondent can discern, the argument appears to be that the record does not reflect one in a series of incidents which

led to Petitioner Friel's being held in contempt, and that this denies him due process. It is only the incident which finally impelled the trial justice to invoke the contempt sanction -- Petitioner Friel's vulgar announcement that he had "to piss," followed by his leaving the courtroom without permission, followed by his approaching the bench and glaring, followed by his obscene gesture, accompanied by his derisive sarcasm -- that is said not to be "cited of record." The argument appears really to refer to the trial transcript when it uses the phrase "cited of record."

This issue was neither presented to nor passed upon by the Maine Supreme Judicial

Court. Petitioner Friel in the Maine court did complain that "[a] review of the record in this case gives little indication of exactly what word or deed gave rise to the Court's finding of contempt against Mr. Friel." Brief of Appellant at 9, State v. Friel, 497 A.2d 475 (Me. 1985). But at no time was the argument made that any claimed inadequacies in the transcript constituted a denial of due process. It is settled that this Court will not undertake to review a claim when a lower court has not been given an opportunity to pass on it. E.g., Illinois v. Gates, 462 U.S. 213, 217 (1983).

Furthermore, even had Point I been properly preserved, it raises no substantial federal question. The Petition

misconstrues what the "record" is.[5]

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[5] The Petition also misquotes the transcript, by both omission and commission. For example, the Petition at 11 quotes T. at 409 as follows:

> "THE COURT: Due to the conduct of the Defendant in this Courtroom, which I find totally disrespectful, I do hereby find Mr. Friel in contempt of court. I do hereby sentence him to three days at the Knox County Jail, the Defendant, Mr. Friel."
>
> MR. CAMPBELL: What conduct?
>
> THE COURT: Mr. Campbell, you are an officer of the Court.

In fact, just after "MR. CAMPBELL: What conduct?" the following was stated:

> THE COURT: The Defendant is to be taken into custody and removed from the courtroom.
>
> MR. CAMPBELL: What conduct? I just addressed the Court--

M.R. Crim. P. 42(a), which is identical to F.R. Crim. P. 42(a) except for the word "justice" instead of "judge,"

The Petition at 15, quoting T. at 415, similarly leaves words out. And in another instance, Petition at 17, words are inserted as if they are in the transcript when they are not. The phrase "(No further response by the Court.)" is not in the transcript.

Likewise, the Petition often miscites the transcript. For example, the Petition at 27 says:

> The trial judge was represented by the Attorney General of the State of Maine, which was prosecuting Friel. (M.T. 99-101, 104-106, 134-135, 161-164, 170, 184-187, 316-317, 369-370.)

To begin with, there are no such "M.T." pages. Even if read as pages of the record ("R. at __") or transcript ("T at__"), only the very last references, R. at 369-370, supports the proposition stated, which in any event does not appear relevant to any issue raised by the Petitioner.

requires a trial justice to file an "order of contempt [which] shall recite the facts and shall be signed by the justice and entered of record." The order thus becomes a part of the record for appellate review, as it did in this case by the trial justice's AFFIDAVIT AND ORDER. (Petition, App. 5-1 to 5-7 and 6-1 to 6-4.) The argument in Point I of the Petition simply ignores that the trial justice's AFFIDAVIT AND ORDER is an integral part of the record and that the Maine Supreme Judicial Court had no difficulty ascertaining what Petitioner Friel's contumacious conduct was.

The Maine Supreme Judicial Court in this case merely applied its previous decisions by which, together, "the order and trial transcript provide a sufficient

basis for review." State v. DeLong, 456 A.2d 877, 883 (Me. 1983). As the Petition at 12 recognizes, this Court has followed a like approach. E.g., Taylor v. Hayes, 418 U.S. at 492-94 n.3; Sacher v. United States, 343 U.S. 1, 5 (1952).

The reason both are considered is to provide "as full a picture as words can portray of the contumacious conduct." State v. Alexander, 257 A.2d 778, 781 (Me. 1969). The transcript itself cannot describe a "defendant's 'manner' while speaking and his 'tone of voice' as being 'insulting.'" In re Steinberger, 387 A.2d 1121, 1123 (Me.), cert. denied, 439 U.S. 985 (1978). "The stenographic record will not pick up such elements of in-court misbehavior as rude and disrespectful tone

of voice or manner of address, nor the shaking of one's finger in a belligerant way." State v. Alexander, 257 A.2d at 781. See also United States v. Proffitt, 498 F.2d 1124, 1129 (3d Cir.), cert. denied, 419 U.S. 1002 (1974) ("the printed words do not reveal the smirk, the sneer, or the clearly felt, though perhaps nonarticulated intent of the defendant" (footnote omitted)).

Petitioner Friel would have this Court impose a due process requirement that a trial judge, each and every time he observes contumacious behavior, shall speak to the court reporter and have him take down a description of the misconduct as the judge saw it. Such Shakespearean asides would only further interrupt and prolong

proceedings and would provide disputatious and disruptive defendants a platform from which to object, for the sake of objecting, to the court's descriptions. It is not to be expected that disrespectful and disorderly defendants suddenly are going to accept without debate or quarrel, perhaps considerable, a trial court's descriptions.

III. THE SUPREME JUDICIAL COURT OF MAINE CORRECTLY FOUND THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONTEMPT CITATION OF PETITIONER CAMPBELL.

Point II of the Petition by its terms applies only to Petitioner Campbell.[6]

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[6] The very statement of Point II is in error, Petition at 47, stating that the trial justice held Petitioner Campbell in contempt in part due to his failure to cross-examine witnesses. This is demonstrably not so, inasmuch as the failures to cross-examine did not occur until after Petitioner Campbell had been

Respondent has already shown that this

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held in contempt. Moreover, the Petitioner miscites as five the number of witnesses not cross-examined. In fact, there were four witnesses, one of whom twice was not cross-examined by Petitioner Campbell. (T. at 441, 446, 456, 460-461, 467.)

Furthermore, as with the Petition's first point, the argument in Point II contains flat inaccuracies. The Petition at 48 (emphasis in original) states:

> The trial transcript, however, discloses that counsel, when directed, remained in the Courtroom at all times, (T.T. at 440-469), and that at no time did Campbell's exits or entrances disrupt the trial, (T. T. 414, 415, 416, 417, 420, 424-427, 431-432.), but the trial continued with celerity. Further, the trial judge at no time prohibited consultation with his client until after finding Campbell in contempt. (T.T. 417, 420, 425, 431-432, 440.)

In fact, the trial justice explicitly had refused to give Petitioner Campbell permission to leave the courtroom (T. at

point is based on an erroneous premise --

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424), telling him that if he did so it would be "at [his] peril." (T. at 415, 417.) Thus it is, too, that the last sentence quoted above is simply wrong. The court refused, before holding him in contempt, to allow Petitioner Campbell to leave to speak with his client. (T. at 417, 424.) And after he was held in contempt (T. at 440), Petitioner Campbell never asked to consult with his client. Rather he chose "to stand mute" as several witnesses testified. (T. at 447.)

Indeed, the Petition at 18 admits Petitioner Campbell left the courtroom:

> The trial judge allowed Campbell thereafter without comment to exit the Courtroom three times to a room where the trial justice stated that Friel could listen to the trial. (T.T. 427, 430-432.) The trial continued during Campbell's brief absences.

Yet even this is erroneous. The first sentence quoted just above is accurate only in the sense that, when Petitioner Campbell did wander out of and back into the courtroom (T. at 420-424, 425-427, 431-432), the trial justice did not have the sheriff restrain him. But to say that

that the trial justice was not impartial -- and one inapplicable to Petitioner Campbell in any event. Apart from this, the argument in Point II, although couched in constitutional terms, simply asks this Court to review the sufficiency of the evidence by relitigating whether in the particular circumstances of this case the trial court properly held Petitioner

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the court "allowed" him to leave is disingenuous at best. Further, the second sentence quoted just above is most misleading. While it is true that the trial did not grind to a halt, that was not the result of any effort or desire of Petitioner Campbell. On one occasion Petitioner Campbell returned to the courtroom and spoke to the trial justice during the State's examination of a witness. The trial justice told him "you are interrupting the proceedings." (T. at 424.) Petitioner Campbell three times previously had sought, by mistrial motions, to terminate the trial. (T. at 386, 407, 415-416.)

Campbell in contempt.[7]

After full and careful consideration of substantial evidence, the Maine Supreme Judicial Court correctly held:

> Campbell's disruptive actions and statements on the several occasions when he left and then reentered the courtroom were all part of his continuing refusal to abide by the ruling of the court excluding his client from

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[7] Among other things, the trial justice's "AFFIDAVIT AND ORDER," setting forth the bases for the contempt citation, notes that Petitioner Campbell shook hands with a witness in the jury's presence. App. at 6-2. The Petition at 49 n.7 in justifying such conduct says that the Maine court "ignore[ed] he was in fact of record a defense witness. (R. 435; T.T. 299)." (Emphasis in original.) Even if true, that would not justify the conduct, of course. But additionally, the Petition is entirely misleading. The reference to R. at 435 is to a defense request to have this witness subpoenaed. But that hardly makes him a defense witness when he was testifying, as he was, during the State's case-in-chief.

> the proceedings. Campbell went far beyond the bounds of permissible advocacy in responding to this ruling of the Superior Court.

State v. Campbell, 497 A.2d at 472-73, App. at 1-17 to 1-18. The facts of this case are peculiar and unlikely to recur. This Court "do[es] not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). This Court's discretionary review is not warranted to resolve any issue important to the law itself.

IV. THIS COURT SHOULD NOT REVIEW THE PROPRIETY OF A FEDERAL COURT ORDER TO WHICH RESPONDENT IS NOT A PARTY, WHICH IS NOT RELEVANT TO EITHER PETITIONER'S CONTEMPT CONVICTION, WHICH WAS NOT TIMELY BROUGHT TO THE ATTENTION OF THE SUPREME JUDICIAL COURT OF MAINE, AND UPON WHICH IN ANY EVENT THAT COURT COULD HAVE MADE NO JUDGMENT.

Point III of the Petition concerns a matter about which Respondent has no real knowledge.[8] It concerns a federal court order to which Respondent is not a party. It was never raised before the Maine Supreme

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[8] Yet even here again the Petition miscites the record. The Petition at 56 refers to "(R. 42)" as support for the statement that Petitioner Friel made an "express objection" to the appointment of the investigator. If he did, it is certainly not demonstrated by R. at 42 or T. at 42.

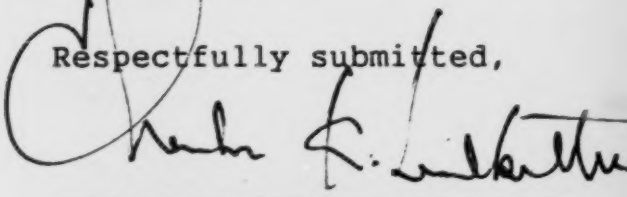
Judicial Court for decision by that court. The affidavit of Petitioner Friel described in the Petition at 56 is dated August 15, 1985 -- nine days after the Maine Supreme Judicial Court had affirmed the contempt convictions of both Petitioners.

In any event, Respondent does not comprehend what decision the state court could have rendered relative to a federal court order. Respondent simply does not understand what relevance this matter has to the contempt convictions of either Petitioner. This Court should not exercise its discretionary power to review a matter which has nothing to do with the judgments entered below.

CONCLUSION

Upon consideration of the substance of the points raised by Petitioners, as well as under U.S. Sup. Ct. Rule 21.5, the joint Petition for Writs of Certiorari should be denied.

Respectfully submitted,



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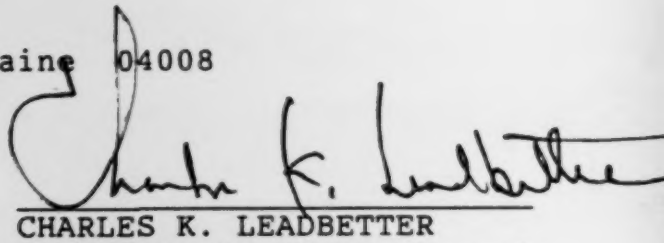
Dated: November 20, 1985

CERTIFICATE OF SERVICE

I, Charles K. Leadbetter, Assistant Attorney General, hereby certify that pursuant to U.S. Sup. Ct. Rules 22.1, 28.3, and 28.5(b), I have caused three copies of the foregoing "Brief of Respondent in Opposition" to be served on the other parties to this proceeding by depositing said copies in the United States Mail, postage prepaid, addressed to:

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